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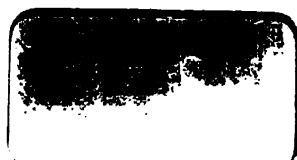
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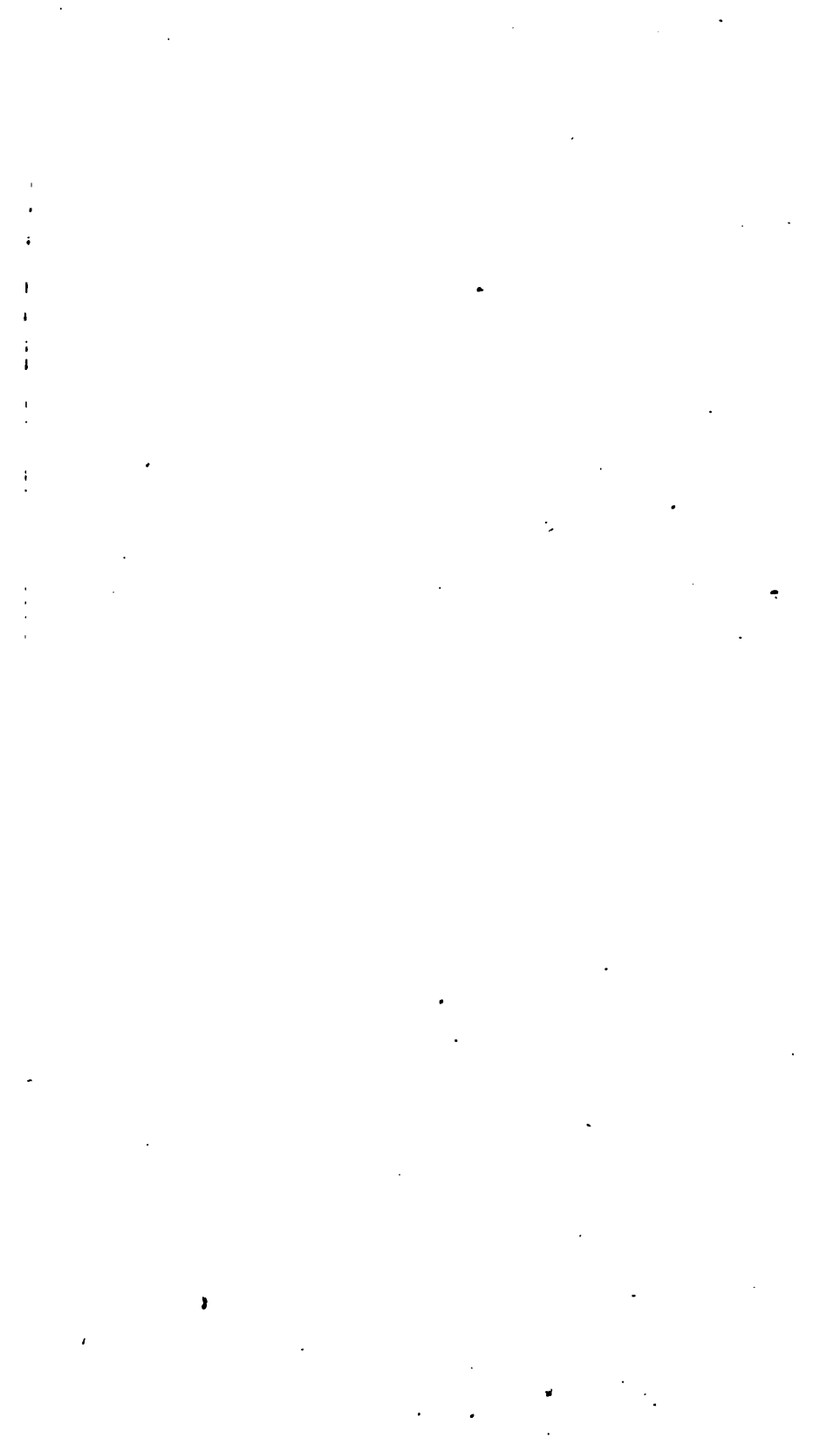
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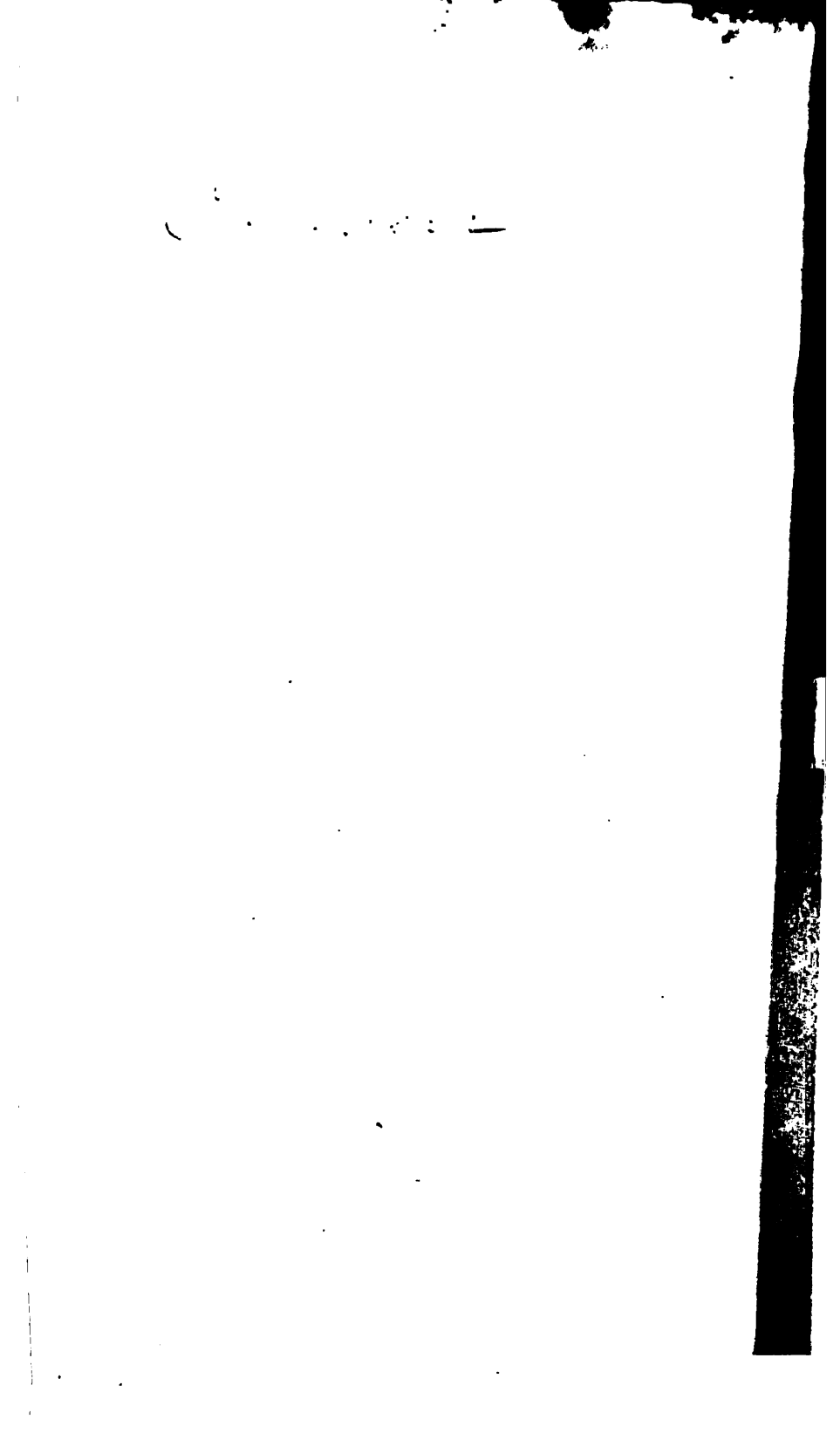
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THE
AMERICAN DECISIONS

CONTAINING THE

CASES OF GENERAL VALUE AND AUTHORITY

DECIDED IN

THE COURTS OF THE SEVERAL STATES

**FROM THE EARLIEST ISSUE OF THE STATE REPORTS TO
THE YEAR 1868.**

COMPILED AND ANNOTATED

BY A. C. FREEMAN,

**COUNSELLOR AT LAW, AND AUTHOR OF "TREATISES ON THE LAW OF JUDGMENT,"
"CO-TENANCY AND PARTITION," "EXECUTIONS IN CIVIL CASES," ETC.**

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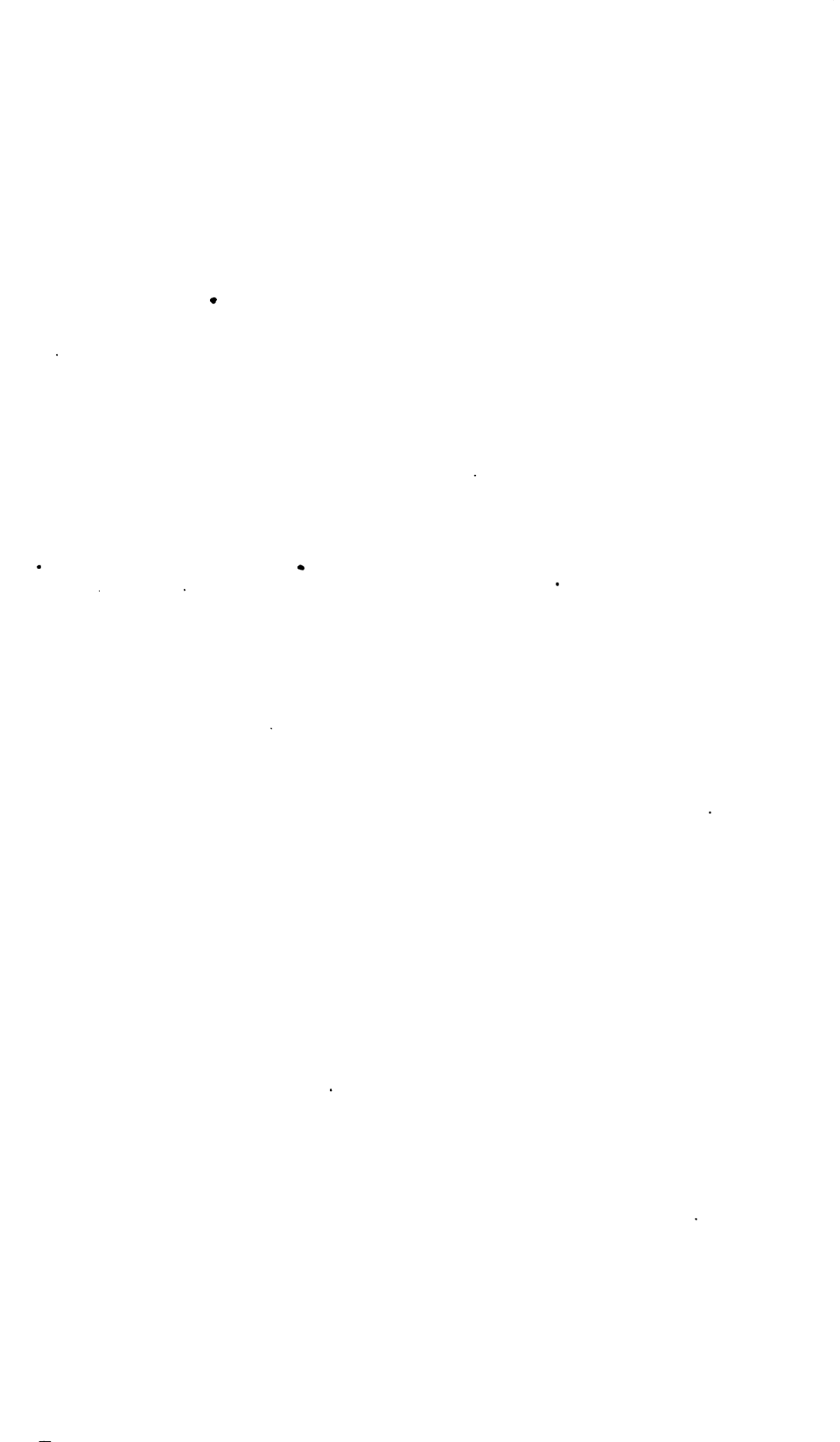
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AMERICAN DECISIONS.

VOL. LXXXVII.



CASE
IN THE
SUPREME COURT
OF
ALABAMA.

EASTON v. STATE.

[30 ALABAMA, 551.]

JUDGMENT FOR CONTEMPT IS VALID WITHOUT ANY REBUTTAL of the facts which constitute the contempt. It is proper for the court to so state the facts, as if as stated they do not amount to contempt, the prisoner may be discharged, but their statement is not necessary to the validity of the judgment.

APPEAL DOES NOT LIE FROM JUDGMENT OF COURT IMPOSING FINE FOR CONTEMPT.

APPEAL from a judgment adjudging plaintiff guilty of contempt. The judgment in form ordered that a fine of fifty dollars be entered against W. C. Easton for contempt, and that the state recover from the said Easton the said sum. The judgment is assigned as error.

Easton, pro se

Baldwin, attorney-general, contra.

By Court, STONE, J. The power to punish contempts by fine and imprisonment is incident to all courts of justice; and without such power the administration of the law would be in continual danger of being thwarted by the lawless. This power seems to be as ancient as courts themselves: See 4 Bla. Com. 288.

It is also settled by an unbroken chain of authorities, that when the contempt is committed in the face of the court, "the offender may be instantly apprehended and imprisoned, at the discretion of the judges, without any further proof or

examination: 4 Bla. Com. 286; 1 Tidd's Practice, 479; Bouvier's Bac. Abr. 633.

Another principle seems to be equally well settled, to wit: that a judgment or sentence for contempt is valid without any recital of the conduct or facts which constitute the contempt: See *Ex parte Simmons*, 5 Ired. 149; *State v. Woodfin*, 9 Id. 199; *Lord Mayor's Case*, 3 Wils. 188, 204.

In the case of *Ex parte Simmons*, *supra*, Chief Justice Ruffin, delivering the opinion of the court, said: "It does not seem to us at present that this order can be impeached. It was, indeed, suggested that it might, because it does not sufficiently set out the facts on which the contempt arose; and it was supposed that an order is void in which a case of contempt is not made out by a statement of proper facts and finding of the contempt by the court upon those facts. But we do not hold such to be the law. The question has often arisen in England, and recently it has undergone in that country very elaborate, anxious, and learned discussion, both in Parliament and in the courts, and it is now given up that the facts constituting the alleged contempt need not be stated. If, indeed, they be stated and be insufficient,—that is, are such as manifestly cannot amount to a contempt,—it seems properly agreed that it must be disregarded, and the party discharged from an unlawful imprisonment, as in *Bushell's Case*, Vaughan, 135, where he was committed 'for giving a verdict against full and clear evidence.' Therefore it befits every court which has a proper tenderness for the rights of the citizen, and a due respect to its own character, to state the facts explicitly, not suppressing those on which the person might be entitled to be discharged, more than it would insert others which did not exist for the sake of justifying the commitment. A court which knows its duty, and is not conscious of violating it, will ever be desirous of putting upon the record, or in its process, the truth of the case, especially as thereby a higher court may be able to enlarge a citizen illegally committed or fined. But if the commitment or fine be in a general form for contempt, all other courts are bound by it, and the party can only free himself by [p]urging the contempt before the court that has adjudged it." See also *Burdett v. Abbott*, 14 East, 1; S. C., 5 Dow, 199; *Case of Hobhouse*, 3 Barn. & Ald. 420; *Stockdale v. Hansard*, 9 Ad. & E. 1.

We approve what is here said by Chief Justice Ruffin; and while we think the practice of inserting in the judgment the

facts which constitute the contempt would be far more satisfactory, we do not think such insertion necessary to the validity of the judgment. Neither do we think our statute (Code, sec. 561) has modified the rule above discussed.

We have said thus much to show that the present appellant is without remedy in any court or in any form. If the judgment entry showed error on its face, possibly it would furnish ground for a *certiorari*; or, if the party has been illegally imprisoned, for a *habeas corpus*. It furnishes no ground for appeal: See *State v. Woodfin*, 5 Ired. 199; *Ex parte Simmons*, 5 Id. 149; *Ex parte Martin*, 5 Yerg. 456; *State v. Tipton*, 1 Blackf. 166.

Appeal dismissed.

LAW OF CONTEMPTS IS DISCUSSED AT LENGTH in *Williamson's Case*, 67 Am. Dec. 374, and note. In the note to *Ex parte Grace*, 79 Id. 529, it is said that when the facts plainly show that the alleged contempt was not one in reality, the prisoner may be discharged on *habeas corpus*. For further discussion of the law of contempts, see *Ex parte Adams*, 59 Id. 224; *Noel v. State*, 50 Id. 209; *Albany Bank v. Schermerhorn*, 33 Id. 551, and notes.

CASE
IN THE
SUPREME COURT
OF
ARKANSAS.

RISON v. FARR.

[24 ARKANSAS, 161.]

LEGISLATION IS EXERCISE OF SOVEREIGN POWER, and the legislature is supreme and uncontrollable, except in the particulars in which its power is restricted by the constitution.

CONSTITUTION IS SUPREME LAW OF LAND, IS OF BINDING FORCE AND OBLIGATION UPON ALL departments of the government, fixes their powers, and limits the bounds within which they must act. It is fixed, permanent, uncontrollable, and transcendant in its nature and operation, and can be changed or revoked only by the power that made it, — the people.

ACT OF LEGISLATURE MUST NOT INFRINGE upon either the constitution of the United States or upon that of the state, and if it does so it is absolutely void.

JUDICIAL DEPARTMENT IS PROPER POWER TO DECLARE CONSTITUTIONALITY OF LAW, and every act of the legislature contrary to the true intent and meaning of the constitution will be declared null and void.

WHERE CONSTITUTION PROVIDES QUALIFICATIONS OF ELECTORS, ADDITIONAL ONES CANNOT BE REQUIRED by act of legislature, and no person possessing the constitutional qualifications can be deprived of the exercise of the elective franchise by mere legislative enactment while the constitution remains unaltered.

WHERE CONSTITUTION PROVIDES QUALIFICATIONS OF ELECTORS, an act of the legislature requiring the voter to take an oath to support the constitution of the United States and of the state does not restrict the right to vote as conferred by the constitution, nor add to the qualifications therein required, and is not unconstitutional.

WHERE CONSTITUTION PROVIDES QUALIFICATION OF VOTERS, an act of the legislature requiring one who seeks to vote to first take oath that he has not borne arms against the United States or the state, or aided the so-called confederate authorities, since a certain date, is unconstitutional, as such act is equivalent to a provision that no one who has so borne arms shall vote, and so adds additional qualifications; and again, such provis-

ion is puritive, and by such oath the person is found guilty and punished by being denied the right to vote, without due process of law.

PARDON OF PRESIDENT OF UNITED STATES RELIEVES RECIPIENT FROM ALL DISABILITY OR RESPONSIBILITY on account of the commission of the offense for which he was pardoned. This principle applied to the President's proclamation of pardon and amnesty of May 29, 1865.

DUE PROCESS OF LAW. — The rights, liberties, or privileges of citizens cannot be taken away or abridged by act of the legislature, or in any way except by due process of law, that is, by means of law in its regular course of administration through courts of justice.

PLEA BAD IN PART IS BAD FOR WHOLE, WHERE PLEA IS ENTIRE.

THE opinion states the case.

Newton, for the plaintiffs.

Clark, Williams, and Martin, and English and Wilshire, for the defendant.

By Court, YONLEY, C. J. This was an action on the case, brought by the defendant in error against the plaintiffs in error in the Pulaski circuit court, at the September term, A. D. 1865.

The declaration alleges that John W. Rison, Richard Bragg, and Gilbert Knapp were, on the ninth day of October, A. D. 1865, at the county of Pulaski, duly appointed, qualified, and acting judges of an election, held according to law, at the market-house precinct, in the city of Little Rock, in the county of Pulaski, on the said ninth day of October, A. D. 1865, for a member of the thirty-ninth Congress of the United States, in and for the second congressional district of Arkansas; and that after the polls had been duly opened for the reception of votes, Farr, the plaintiff below, being a free white male citizen of the United States, and a citizen of the state of Arkansas more than six months next before said election, over the age of twenty-one years, and a resident of the county of Pulaski aforesaid, and having taken and subscribed the amnesty oath prescribed in and by the proclamation of Andrew Johnson, President of the United States, bearing date the twenty-ninth day of May, A. D. 1865, presented himself before the defendants below, while acting as such judges of election as aforesaid, and offered to vote for Lorenzo Gibson, one of the candidates for representative from the second congressional district; but that the defendants below willfully, and contrary to law, refused to permit him to vote at said election, whereby he was illegally deprived of the exercise of the elective franchise guaranteed to him by the constitution of the state of Arkansas as a citizen thereof, and a resident of said county of Pulaski.

The declaration was filed on the eleventh day of October, A. D. 1865, by leave of the court below, and on the twelfth day of October the defendants below entered their appearance, and interposed the following plea:—

“Come the said defendants by attorney, and defend the wrong and injury when, etc., and say *actio non*, because they say that when said plaintiff offered to vote, as in said declaration supposed, they, as such judges of said election as in said declaration mentioned, demanded of him that he should, before depositing his vote, take an oath in accordance with the statute in that behalf that he would support the constitution of the United States and of this state, and that he had not voluntarily borne arms against the United States or this state, nor aided, directly or indirectly, the so-called confederate authorities, since the eighteenth day of April, A. D. 1864, which said oath the said plaintiff then and there refused to take, wherefore said defendants, as such judges as aforesaid, did then and there refuse to receive said vote of the plaintiff, as they might and as it was their duty to do, for the causes aforesaid.”

To this plea the plaintiff below demurred, and assigned for cause of demurrer that the statute relied by the defendants below, in their plea, is in direct conflict with the constitution of the state of Arkansas, and is null and void, and furnishes no legal excuse for refusing the vote of said plaintiff below at said election.

The demurrer, upon argument, was sustained by the court, and the plaintiffs in error electing to rest upon their plea, final judgment was rendered in favor of the defendant in error by his consent by the court, a jury having been waived, for one cent damages and cost of suit.

To reverse the judgment of the court below, the plaintiffs in error have brought the cause before this court by writ of error, and assign for error: 1. That the court erred in sustaining the demurrer to the defendant's plea; 2. A general assignment of error. Thus presenting here for adjudication the constitutionality of the sixth section of the act of the legislature of the state of Arkansas, entitled “An act to provide for the manner of holding elections,” approved May 31, A. D. 1864.

Before attempting to ascertain whether the sixth section of the act above referred to is in conflict with and repugnant to the constitution of this state, we will attempt to define the

limitations which that instrument imposes upon the powers of the legislative and other branches of the government of the state of Arkansas; how far and by what principles legislative power is controlled under our form of government.

Legislation is the exercise of sovereign power, and under some forms of government the power of the legislature is supreme and uncontrollable, knows no limits, and is subject to no restrictions. The power and jurisdiction of Parliament, says Sir Edward Coke, are so transcendent and absolute that they cannot be confined either for causes or persons within any bounds. In England, the powers of Parliament are without limit and are subject to no check; because, under that form of government, there is no written constitution or fundamental law by which the validity of a statute can be tested; and all that can be said of it is, that it is an act of Parliament and must be obeyed.

But such is not the case in America; for here, every state in the Union has a written constitution, which defines to a certainty what the powers of each branch of the government are, and determines what rights the people have delegated to their representatives, and what they have retained or created for themselves by their organic law.

Patterson, J., in *Vanhorne v. Dorrance*, 2 Dall. 308, in defining what a constitution is, says: "It is the form of government delineated by the mighty hand of the people, in which certain first principles of fundamental laws are established. The constitution is certain and fixed; it contains the permanent will of the people, and is the supreme law of the land; it is paramount to the legislature, and can be revoked or altered only by the authority that made it. The life-giving principle and the death-dealing stroke must proceed from the same hand."

And in defining what legislatures are, the same learned judge says: "They are creatures of the constitution; they owe their existence to the constitution; they derive their powers from the constitution. It is their commission, and therefore all their acts must be conformable to it, or else they will be void. The constitution is the work or will of the people themselves in their original, sovereign, and unlimited capacity; law is the work or will of the legislature in their derivative or subordinate capacity. The one is the work of the creator, the other of the creature."

The constitution fixes limits to the exercise of legislative

authority, and prescribes the orbit within which it must move. In short, the constitution is the sun around which all legislative, executive, and judicial bodies must revolve; and that whatever may be the case in other countries, yet in this there can be no doubt that every act of the legislature repugnant to the constitution is null and void.

The constitution of the state of Arkansas is, then, the supreme law of the land, the commission or power of attorney which the people of a state have given to their representatives, defining and limiting the bounds within which they must act, and fixing the power which each department of the government may exercise; and is the supreme law of the land, and is fixed, permanent, uncontrollable, and transcendent in its nature and operation, and cannot be revoked or altered except by the power that made it.

The constitution of this state is of binding force and obligation upon all departments of the government, and assigns the sphere within which each must act, and establishes bounds beyond which neither can go. It is the work of the people, speaking in their original capacity, and establishes the permanent conditions of social alliance, and furnishes the test by which every act of the legislative, as well as of the executive and judicial, departments must be tried, and to which every act done by either must conform.

The constitution is the fortification within which the people have intrenched themselves for the preservation of their rights and privileges, and every act of the legislature, or other department of government, which infringes upon any right declared in the constitution, whether it be inherent in the people or created by that instrument, is absolutely void: *Rector v. State*, 6 Ark. 187; *Eason v. State*, 11 Id. 481; *Marbury v. Madison*, 1 Cranch; 3 Kinnie's Law Comp. 314, and the numerous authorities there cited.

In the case of *Houston v. Moore*, 5 Wheat. 1, the court said: "The law with us must conform, in the first place, to the constitution of the United States, and then to the subordinate constitution of this particular state, and if it infringes upon the provisions of either, it is so far void."

By a course of judicial decisions reaching from the earliest history of American government to the present day, without a dissenting voice, it has been adjudged that courts of justice have the right and are in duty bound to test every law by the constitution, as the fundamental and paramount law of the

land, governing all derivative power and the exercise thereof. The judicial department with us is the proper power, under the constitution, to declare the constitutionality of a law, and every act of the legislature contrary to the true intent and meaning of the constitution will be declared by the courts null and void, and of no effect whatever.

To contend that this is not so would be to assert that the legislative branch of the government is supreme in its authority; that the creature is mightier than the creator; that the agent has greater power than his principal, who has commissioned him and sent him out to transact business under a written authority; that one co-ordinate and concurrent branch or department of the government, subordinate to the constitution, is absolute over the departments, and can control, according to its will and pleasure, all others. It would be to assign limits to legislative power by constitutional provisions restraining the legislative body within certain bounds, and then to declare that, although it had passed beyond the limits assigned to its power and violated the authority designed to govern it, yet that its action is valid and of binding force and obligation upon the other departments of government, and has the effect to take away the very rights from the people which they have secured to themselves by constitutional provisions,—a doctrine too monstrous to be for a moment entertained, and in every way dissonant to the fundamental principles and theories upon which our government is based, and one which in practice would soon sweep away every vestige of the rights of the people, and reduce them to subjection to absolute power, or, what would be worse, to a state of anarchy and confusion, where life, property, and every right would be left to the mercy of the legislative power.

With these principles before us, we will proceed to determine whether the act of the legislature of the state of Arkansas, under which the plaintiffs in error justify their conduct in refusing to permit the plaintiff below to vote, is a constitutional law; for if so, it is valid and binding, and the plaintiff below had no right to vote, and was deprived of nothing which belonged to him; but upon the contrary, if the law relied upon by the defendants below is repugnant to the constitution of this state, then it is void, and can afford them no justification or excuse for what they did.

Section 2 of article 4 of the constitution of the state of Arkansas provides that "every free white male citizen of the

United States who shall have attained the age of twenty-one years, and who shall have been a citizen of the state six months next preceding the election, shall be deemed a qualified elector, and be entitled to vote in the county or district where he actually resides."

The plaintiff below, by his declaration, avers that he was possessed of all the qualifications required by this section of the constitution, with the additional fact that he had taken and subscribed the oath prescribed by the proclamation of the President of the United States bearing date the twenty-ninth day of May last; and the defendants below do not traverse or in any manner put in issue the truth of these allegations, but confess the truth of them by way of confession and avoidance the sixth section of the act of the legislature of the state of Arkansas above referred to, and which is in words as follows:—

"That each voter shall, before depositing his vote at any election in this state, take an oath that he will support the constitution of the United States and of this state, and that he has not voluntarily borne arms against the United States or this state, nor aided, directly or indirectly, the so-called confederate authorities, since the eighteenth day of April, 1864; said oath to be administered by one of the election officers; and this act to take effect from and after its passage."

Section 2 of article 4 of the constitution fixes the qualifications and determines who shall be deemed qualified voters in this state in direct, positive, and affirmative terms, and these qualifications cannot be added to by legislative enactment.

The convention, when it formed the constitution, after having enunciated the time-honored principles found, we believe, in all American constitutions, "that all power is inherent in the people, and all free governments instituted for their peace and happiness," declare by the section of the constitution above quoted who shall be deemed qualified electors in this state, and have fixed all the prerequisites necessary to qualify a citizen to exercise the elective franchise.

The framers of the present constitution of this state had in view and represented all the people thereof, men, women, and children, white, colored, and Indians, and recognizing, as they declare in the preamble of the constitution, the "legitimate consequences of the existing rebellion," saw fit to provide that every white male citizen of the United States over the age of twenty-one years, and who shall have been a citizen of this state six months next preceding the election, shall be deemed

a qualified voter in the county or district in which he actually resides, and no person having these qualifications can be deprived of the exercise of the elective franchise by mere legislative enactment, while the constitution remains unaltered. Indeed, the right of those having the constitutional qualifications to vote is founded in the fundamental law of the land, and cannot be legislated away. The right of suffrage in this state, if not an inherent is at least a constitutional right, and whoever possesses the required qualification cannot be restrained from the exercise of that right except by the alteration of the constitution; and any law infringing upon that right as vested by the constitution is null and void.

Then the inquiry is, Has the sixth section of the act above copied the effect to abridge the right of suffrage conferred by the constitution? Does that law require other and different qualifications than those required by the constitution?—in short, is the law repugnant to the constitution? The answer to these inquiries will be arrived at by an examination of the law in question.

The sixth section of the act under consideration has a two-fold operation: one prospective and the other retrospective.

That part of the law which requires the voter, before depositing his vote, to swear that he will support the constitution of the United States and of this state is prospective in its operation, and looks to the future conduct of the voter, and requires nothing more of him than by law he is bound to do. This part of the law does not look into his past history or scrutinize his antecedents. It does not demand that he shall purge himself of treason against the United States or this state. It does not have the effect to restrict the right to vote as conferred by the constitution, nor does it add to the qualifications required by the constitution, and is therefore free from the objection of unconstitutionality, and is, as we conceive, thus far a valid law: *Bank of Hamilton v. Dudley*, 2 Pet. 526; *Clark v. Ellis*, 2 Blackf. 8.

But how is it with the residue of the oath required? That part of the law which requires the voter, before depositing his vote, to swear that he has not voluntarily borne arms against the United States or this state, nor aided the so-called confederate authorities since the eighteenth day of April, A. D. 1864, is retrospective, and calls upon the voter to purge himself of treason against both the United States and this state, before he is allowed to vote; and although this part of the

law is professedly enacted "to provide the manner of holding elections," it is, in effect, nothing but a prohibition upon the right to vote as secured by the constitution; and is of the same import as an affirmative provision that no person who has voluntarily borne arms against the United States or this state, or aided the so-called confederate authorities, since the eighteenth day of April, 1864, shall be allowed to vote at any election in the state of Arkansas. And to admit that the legislature may do this would be to declare that part of the constitution which defines the qualifications of a voter absolutely nugatory, and would turn section 2 of article 4 of our constitution into the merest nonsense. And clearly, if the legislature cannot, by direct legislation, prohibit those who possess the constitutional qualification to vote from exercising the elective franchise, that end cannot be accomplished by indirect legislation. The legislature cannot, under color of regulating the manner of holding elections, which to some extent that body has a right to do, impose such restrictions as will have the effect to take away the right to vote as secured by the constitution.

The legislature may compel a voter to take an oath to the effect that he possesses the qualifications prescribed by the constitution; and may fix the time of holding elections, and the manner of making returns, etc.; for those things are within the constitutional powers of the legislature.

And again, it is to be observed that that part of the law which requires the voter to swear that he has not borne arms against the United States or this state, or aided the so-called confederate authorities, is punitive in its operation. It is attempted by this provision to ascertain whether the voter has offended within the meaning of the act; and if by the searching operation of the oath prescribed he is found guilty, the penalty annexed is the loss of the right to vote, and that, too, by a process entirely unknown to our constitution and laws. So much of the oath as relates to bearing arms against the United States and aiding the so-called confederate authorities refers directly to offenses against the government of the United States, and as such are not within the powers and jurisdiction of this state to punish even by due process of law; and much less can the legislature, by mere legislation, punish such offenses, and as a penalty take away the right of suffrage from a qualified voter of this state. These are crimes against the United States, and can only be punished or forgiven by that

government, and are not cognizable before any authority or tribunal of a state. And the chief magistrate of the United States, acting upon this principle, by his proclamation of the 29th of May last, in conformity with the authority conferred upon him by the constitution of the United States, and the act of Congress made in pursuance thereof, has most graciously extended pardon and amnesty to a large majority of the citizens of this state who had engaged in the late rebellion, declaring that all persons not excepted by said proclamation from the benefits thereof, who would take and subscribe a certain oath thereby prescribed, should receive full amnesty and pardon.

Within the provisions of which proclamation the plaintiff below has brought himself by the averments contained in his declaration. Hence, whatever might otherwise have been the effect of his having borne arms against the United States, or of his having aided the so-called confederate authorities, he has now been fully pardoned and forgiven, and is no longer amenable to any authority for his acts in that behalf; and to deprive him of his right to vote on account of his participation in the war against the United States would be to punish him for a crime of which he has been pardoned; or in other language, to inflict a penalty where there is no legal guilt.

But if he had not taken the amnesty oath, still, his having borne arms against the United States would not, as we will hereafter show, have worked a forfeiture of his right to vote until he had been convicted thereof by due process of law.

Then as to that part of the law that requires the voter to take an oath that he has not borne arms against this state since the eighteenth day of April, A. D. 1864.

To bear arms against the state of Arkansas, in the sense of the law under consideration, is to levy war against the state, and is treason, and as such is indictable, and upon due conviction thereof the offender, by the law of this state, is punishable with death, and in that case there would be an end of his voting. But the offender cannot be convicted by an act of the legislature. That body by the mere exercise of legislative authority cannot declare a forfeiture. The legislature cannot enact, apply, and execute a law. The same department, under our form of government, cannot act as legislator, judge, and executioner. Such a course would be in open and palpable violation of section 2, article 3, of the constitution of the state of Arkansas, which ordains that no person or collection of

persons being of the one department of the government shall exercise any power belonging to either of the other departments, except in the instances hereinafter expressly directed or permitted; and the exception herein contained refers to trials by impeachment.

How, then, can a right or privilege be forfeited under our form of government?

The constitution of the state of Arkansas answers this interrogatory. Sections 10 and 14 of the bill of rights put the question forever at rest. The tenth section of the bill of rights declares that "no man shall be taken or imprisoned, or disseised of his freehold liabilities or privileges, or outlawed or exiled, or in any manner destroyed or deprived of his life, liberty, or property, but by the judgment of his peers or the law of the land." And the fourteenth section of the bill of rights provides that "no man shall be put to answer any criminal charge but by presentment, indictment, or impeachment, except as hereinafter provided"; which exception refers to petty offenses made cognizable before justices of the peace.

The tenth section of our bill of rights is taken, with slight variations, from Magna Charta, and is found in substance in all American constitutions, and its meaning is well settled, both in this country and in England, by numerous adjudications. Chancellor Kent says: "It may be received as a proposition universally understood and acknowledged throughout this country, that no person can be taken or imprisoned, or disseised of his freehold or estate, or exiled or condemned, or deprived of his life, liberty, or property, unless by the law of the land or the judgment of his peers. The words "by the law of the land," as used originally in Magna Charta in reference to this subject, are understood to mean due process of law, that is, by indictment or presentment of good and lawful men; and this, says Lord Coke, is the true sense and exposition of those words. The better and larger definition of due process of law is, that it means law in its regular course of administration through courts of justice": 1 Kent's Com. 612; 2 Id. 13; 3 Story's Const. 264, 661; Co. Inst. 45-50.

And Mr. Justice Bronson, commenting upon the provision in the constitution of the state of New York, which provides that "no member of this state shall be disfranchised, or deprived of any of the rights or privileges secured to any citizen thereof, unless by the law of the land or the judgment of his peers," says: "The words, 'by the law of the land,' as here

used, do not mean a statute passed for the purpose of working the wrong. That construction would render the restriction in the constitution absolutely nugatory, and turn this part of the constitution into merest nonsense. The people would be made to say to the two houses, You shall be vested with the legislative power of the state, but no one shall be disfranchised, or deprived of any of the rights or privileges of a citizen, unless you form a statute for that purpose; or in other words, you shall not do wrong, unless you choose to do it": *Taylor v. Porter*, 4 Hill, 145 [40 Am. Dec. 274].

From these and many other authorities that might be cited, it is plain that no one can be deprived of his rights or privileges unless the matter be adjudged against him by due course of common law.

Then it is clear that although treason is the highest crime known to the laws of this state, the mere commission of that offense will not in itself work a forfeiture of the rights or privileges of the offender; but before he can be deprived of all or either of them, he must be convicted by due process of law. From this view of the case it is evident that that part of the sixth section of the act of the legislature of the state of Arkansas, entitled "An act to provide for the manner of holding elections," approved May 31, 1864, which requires the voter, before depositing his vote, to swear that he has not voluntarily borne arms against the United States or this state, nor aided the so-called confederate authorities, since the eighteenth day of April, 1864, is repugnant to and in open conflict with the constitution, and in every point of view is an intrenchment upon the rights secured by the fundamental law of this state, and is therefore absolutely null and void. The constitution having fixed the qualification of an elector in this state, those possessing the qualifications required can no more be deprived of the right to vote by legislative enactment than they can be deprived of the right to trial by jury, or the right to worship God according to the dictates of their own consciences.

Part of the law under which the plaintiffs in error justify being void for unconstitutionality, and their plea being entire, and bad for part, is bad for the whole (1 Ch. Pl. 146), and can afford them no justification or excuse for refusing to accept the vote of the defendant in error at said election.

Finding no error in the proceedings or judgment of the court below, the judgment of that court must be and is hereby affirmed.

LEGISLATURES IN AMERICAN STATES HAVE SAME UNLIMITED POWER as the British Parliament, except where they are restrained by written constitutions: *Thorpe v. Rutland etc. R. R. Co.*, 62 Am. Dec. 625, and note. The power of the legislature to enact laws is restricted or limited only where so expressly provided by the constitution: *People v. Seymour*, 76 Id. 521.

JUDICIAL DEPARTMENT OF GOVERNMENT HAS POWER TO DECLARE ACTS OF LEGISLATURE VOID as unconstitutional, but this power should be exercised with care and circumspection: *Baughner v. Nelson*, 52 Am. Dec. 694; *Santo v. State*, 63 Id. 487; *Denham v. Holeman*, 71 Id. 198; *Mayor etc. of Baltimore v. State*, 74 Id. 572, and notes.

DUE PROCESS OF LAW. — Meaning, effect, and application of this constitutional guaranty: See *Parsons v. Russell*, 83 Am. Dec. 728; and *Ames v. Port Huron etc. Co.*, 83 Id. 731, and the notes to these cases.

PLEA WHICH IS BAD IN PART IS BAD IN TOTO: *Ferrall v. Bradford*, 50 Am. Dec. 293, note; see also *Wittick v. Traun*, 62 Id. 778.

PARDONS. — For a full discussion of the law of pardons, see the note to *State v. McIntire*, 59 Am. Dec. 572.

CONSTITUTIONAL QUALIFICATION OF VOTERS CANNOT BE ADDED TO BY LEGISLATURE. — It is well settled that where the constitution specifies the qualifications necessary to the exercise of the elective franchise, and provides who shall have the right to vote, the legislature has the right to prescribe necessary and proper rules for the orderly exercise of the right resulting from these qualifications. This permissible legislation includes the registry laws and laws regulating the place, mode, or manner of holding elections. But the legislature of a state cannot add to the qualifications of an elector as prescribed by the state constitution. Where the constitution prescribes the qualifications of voters, whoever has the same has a constitutional right to vote, and of this right he cannot be deprived by legislative enactment. An act of the legislature which deprives a person of the right to vote, although he has every qualification which the constitution makes necessary, cannot be sustained: *McCrary on Elections*, sec. 5; *McCafferty v. Guyer*, 59 Pa. St. 109; *Brightly's Election Cases*, 44; *People v. Canaday*, 73 N. C. 198; *State v. Adams*, 2 Stew. 231-239; *St. Joseph etc. R. R. Co. v. Buchanan Co.*, 39 Mo. 485; *State v. Williams*, 5 Wis. 308; *State v. Baker*, 38 Id. 71; *Monroe v. Collins*, 17 Ohio St. 665; *State v. Staten*, 6 Cold. 243; *Davies v. McKeeby*, 5 Nev. 369; *Clayton v. Harris*, 7 Id. 64; *Quinn v. State*, 35 Ind. 485. "The doctrine that the legislature cannot add to the constitutional qualifications of voters is founded upon the well-settled rule of construction that when the constitution specifies the circumstances under which a right may be exercised or a penalty imposed, the specification is an implied prohibition against legislative interference to add to the condition or to extend the penalty to other cases": *McCrary on Elections*, sec. 72; *Cooley's Const. Lim.* 78.

While the legislature has the power to regulate the exercise of the elective franchise guaranteed by the constitution, care must be taken that by such regulations unnecessary impediments are not thrown in the way of the voter. In the language of the Ohio supreme court: "What the legislature cannot do directly, it cannot do by implication. If it has no power expressly to deny or take away the right, it has none to define it away, or unreasonably to abridge or impede its enjoyment by laws professing to be merely remedial. The power of the legislature in such cases is limited to laws regulating the enjoyment of the right by facilitating its lawful exercise, and by preventing

its abuse All reasonable latitude should be allowed to the legislature in the exercise of this power of regulation, and every reasonable intendment in favor of the constitutionality of laws enacted for that purpose should be made by the courts. Such laws are not to be held unconstitutional unless clearly so, and if they will at all bear a construction which makes them consistent with the constitution, they are to receive that construction, and so to be upheld. The true line between laws which take away or abridge the right of suffrage, and those which may lawfully be enacted to regulate its exercise, is laid down by the supreme court of Massachusetts in *Capen v. Foster*, 12 Pick. 488. It was there held substantially that laws of the latter description must be reasonable, uniform, and impartial, and must be calculated to facilitate and secure, rather than to subvert or impede, the exercise of the right to vote": *Monroe v. Collins*, 17 Ohio St. 665, 686.

In this case, the court accordingly held an act which provided that clerks and judges of elections should not be held liable for rejecting the votes of persons having a visible admixture of African blood to be unconstitutional. In its spirit and scope it was calculated to impede, and in great measure to defeat, the right of such persons to vote, as it required an unreasonable burden of proof, and raised an implied limitation to the kind and amount of evidence required by the voter.

Another act, which the Nevada supreme court held unconstitutional, provided that no person should be entitled to have his name registered — and consequently to vote — until he had taken an oath that he had not after attaining the age of eighteen years borne arms against the government. The constitution provided that no such person should vote unless an amnesty had been granted him. In *McCafferty v. Guyer*, 59 Pa. St. 109, an act of the legislature prohibiting deserters from the United States army from voting was held unconstitutional, as it was a restriction which the constitution did not sanction. Cities and towns, like counties and townships, are parts and parcels of the state government, and the qualifications of voters therein are the same as voters generally. Consequently, an act of the legislature incorporating a town, which provides for additional qualifications, is to that extent unconstitutional: *People v. Canaday*, 73 N. C. 198. Where the constitution requires that a person shall have a residence in the township where he offers to vote, without prescribing any period of residence, an act of the legislature requiring a residence of twenty days is unconstitutional: *Quinn v. State*, 35 Ind. 485.

CASES
IN THE
SUPREME COURT
OF
CALIFORNIA.

WILCOXSON v. BURTON.

[27 CALIFORNIA, 223.]

WHEN EVIDENCE IS CONFLICTING, NEW TRIAL WILL NOT BE GRANTED ON the ground that the findings are without evidence to support them.

JUDGMENT CONFERRED BY INSOLVENT DEBTOR in favor of a creditor, without his request or knowledge, and entered up at the instance of the debtor alone, and upon which execution is levied on the latter's property, to enable such creditor to obtain priority over other creditors, is null and void as to subsequent attaching creditors.

JUDGMENT BASED UPON CONFESSION in favor of a creditor, but without his knowledge or request, and entered up at the instance of the debtor alone, does not bar the creditor's right of action for the same debt, nor estop the debtor from denying any and all facts set out in such confession.

JUDGMENT WITHOUT PARTIES, however perfect in form, is not attended with any of the consequences of a judgment, and is void.

JUDGMENT CONFERRED BY DEBTOR in favor of a creditor, without his request or knowledge, may be thereafter ratified, and may become binding as between the parties by the creditor's claiming under and attempting to enforce it. As between the parties it will be good from date of entry, but the ratification can neither overreach nor in any manner affect rights acquired prior to it and while the judgment was one only in name.

JUDGMENT CONFERRED BY DEBTOR in favor of a creditor, without his request or knowledge, is void when confessed on a note given for more than is due the creditor, and for the purpose of defrauding other creditors.

WHERE JUDGMENT IS CONFERRED BY DEBTOR in favor of a creditor on a note which is misdescribed in such judgment and in the statement upon which it is rendered, it is *prima facie* fraudulent, and the burden of rebutting such presumption is on the party claiming under the judgment.

PARTY IS ESTOPPED BY HIS ANSWER from showing the averments therein contained to be untrue.

CONFESSION OF JUDGMENT BY DEBTOR merges no claims of the creditor except such as are included in it by some form of direct statement.

WHEN JUDGMENT CONFESSED BY DEBTOR in favor of his creditor is sought to be set aside as fraudulent, the creditor cannot, in support of the judgment, prove a claim which the statement upon which the judgment was confessed not only does not include, but which it excludes by necessary intendment. He may, however, if he keeps within the limits of the terms used, prove all matters explanatory of the source of indebtedness.

NEW TRIAL WILL NOT BE GRANTED because the court examined account-books as evidence after the case was submitted, if such irregularity is not stated in the record as one of the grounds upon which the motion for a new trial would be made.

THE opinion states the facts.

Winans, for the appellants.

Hartley, for the respondents.

By Court, **SHAFTER, J.** On the second day of October, 1861, a judgment for twenty-four thousand dollars was entered in the district court of the sixth judicial district in favor of C. H. Burton against Burton and McCarty, defendants herein, upon the following statement, duly entitled and sworn to by them:—

“We hereby confess judgment in favor of Charles H. Burton, plaintiff above named, for the sum of twenty-four thousand (\$24,000) dollars, and authorize the entry of judgment against us therefor, with costs.

“This confession of judgment is for a debt now justly due from us to plaintiff, arising upon the following facts: Since the year 1852 up to the present time, plaintiff, Charles H. Burton, has been a resident of San Francisco, and has during such time acted as our agent, i. e., agent of firm of Burton and McCarty, of the city of Sacramento, of which we, John Burton and E. McCarty, are the members. That, as such agent, the plaintiff has, from time to time during the period aforesaid, made advances of money upon our account, and rendered services unto us; that upon the 31st of May, 1861, plaintiff and ourselves accounted together and made a balance sheet of our transactions to that day; that thereupon we were found indebted unto plaintiff in the sum of twenty-seven thousand dollars; that thereupon we gave our obligation unto plaintiff to pay unto him said sum, with interest at the rate of one and one half per cent per month; that upon said note there has been paid the sum of three thousand five hundred dollars.

“J. E. BURTON,

“EDWARD MCCARTY.”

The said Burton and McCarty, on the same day, made a further confession in favor of defendant Spillman for ten thousand dollars, in which the facts out of which the indebtedness arose are set forth as follows:—

“This confession of judgment is for a debt now justly due from us to plaintiff, arising out of the following facts: The plaintiff has, between the years 1852 to 1857, and from thence until the present time, with exception of some four months during the year 1857, been in our (Burton and McCarty's) employ as salesman, at our place of business. During such period we have become, from time to time, indebted unto him for his services, and during such time he has been in the habit of investing with us such moneys as he accumulated, to be used by us in our business. Upon investigating his account with us we find the sum of ten thousand dollars to be justly due him from us.”

This action is brought for the purpose of setting aside these judgments, on the ground that they are, respectively, fraudulent and void as to the plaintiffs, creditors of Burton and McCarty.

As to the judgment in favor of C. H. Burton, the complaint charges that at the date of the confession the indebtedness of Burton and McCarty to C. H. Burton did not exceed two thousand dollars at the most; that the confession was made without his knowledge, consent, or solicitation; and that no person was duly authorized to accept or receive the same in his name or for his benefit; that the same was made by Burton and McCarty on their own motion, and was filed by them or by their procurement; that they took out execution and caused the same to be levied on their property; and that the said C. H. Burton, who resided in San Francisco, knew nothing of these proceedings until the day after the levy, when he, being well aware of their fraudulent character, justified them, and has ever since continued to justify and claim under them as *bona fide*.

As to the judgment of Spillman, the complaint alleges that Burton and McCarty owed him but a few hundred dollars, instead of ten thousand. That Spillman has taken out execution on said judgment and caused it to be levied, and that Burton and McCarty are insolvent.

All the principal allegations were denied. The trial was by the court, who found for the plaintiffs, and judgment was thereupon duly entered upon the findings.

The defendants moved for a new trial, on the ground of insufficiency of the evidence to justify the decision, and that it is against law; and upon the further ground, so far as Spillman is concerned, of newly discovered evidence. The notice also refers to errors of law occurring at the trial, and excepted to by the party, as a ground upon which the motion would be rested; but there is no specification in the record, nor does the brief filed for the appellant refer to any errors falling within the general description.

The motion for new trial was overruled, and the appeal is from the order.

The court finds, generally, that both judgments are fraudulent, as alleged, and then proceeds to find specifically a series of facts, some of which are ultimate in their character, and others secondary merely, raising presumptions more or less cogent as to the truth of the allegations of fraud. Passing the general finding, that both judgments were fraudulent as to the creditors of Burton and McCarty, the counsel of the appellants advances two propositions: 1. That all the facts, both final and secondary, bearing upon the question of fraud, were found by the court upon insufficient testimony; and 2. That the ultimate facts found by the court are, as matter of law, insufficient to support the judgment.

1. We have examined the testimony contained in the voluminous record filed in this action with patient attention; and have furthermore availed ourselves of the thorough and exhaustive discussion of counsel upon the weight of the evidence and the conclusions properly to be drawn from it, and we are satisfied not only that the case is one where the evidence is in conflict, but one in which the court below did not so far mistake the relative weight of the opposing proofs as to justify us in going behind the special findings. The position of the counsel for the appellants, that many of the special findings are without evidence to support them, is not borne out by the record. Where the findings are not sustained by direct evidence in opposition to the positive testimony of the parties to the respective judgments, they are sustained by the admissions or counter-statements in the answers, or by the evidence of circumstances; and under the settled practice of this court, we cannot review the case upon the testimony.

2. The only question remaining to be considered, aside from that made upon the evidence alleged to be newly discovered, and a question of "irregularity," is as to whether all or any of

the final facts, specially found, support the judgments as matter of law.

1. As to the judgment in favor of C. H. Burton.

It is found that Burton and McCarty were insolvent at the date of the judgment; that C. H. Burton resided in San Francisco, and was there the day the judgment was confessed; that the "confession was given and caused to be entered up by Burton and McCarty, of their own motion"; that "no one was authorized by said C. H. Burton to receive said confession of judgment for him or to act as his agent in that respect"; that "he did not know said confession had been made until the day following its entry and after the levy of execution issued thereon, after the levy of plaintiffs' attachment; and that the giving of said confession was a voluntary act on the part of said Burton and McCarty to enable said Charles H. Burton to obtain priority over all the creditors of said Burton and McCarty, including the plaintiffs; and that said Burton and McCarty directed and caused the execution on said confession to be levied on their property immediately after its issuance"; and that "the goods so levied upon were all the visible property of said Burton and McCarty." In addition to these findings, the complaint alleges that at the date of the confession, Burton and McCarty were "apprehensive that the claims of these plaintiffs and others, their *bona fide* creditors, would be presented to them for payment, and if not paid, that attachments would be issued against them and their property"; and that "the confession was made for the purpose of giving a prior lien to C. H. Burton." The truth of these averments is not denied in the answers, and is assumed throughout in the argument of counsel. The question is, What is the legal effect of these facts upon the rights of the parties?

It was held in *Ryan v. Daly*, 6 Cal. 238, on a state of facts like the above in every substantial particular, that the judgment was void as to the subsequent attaching creditor. There can be no doubt as to the right of a debtor in insolvent circumstances to pay or secure a part of his creditors to the prejudice of the balance, nor is it doubted that security may be given effectually by confessions of judgment in favor of the creditors intended to be preferred. The real question is, When does a judgment based upon a confession made without any request on the part of the creditor and without his knowledge, and entered up at the instance of the debtor alone, become a judgment as between the parties to it? — that is,

when does it take effect in fact "as a final determination of the rights of the parties in the proceedings"? Practice Act, sec. 144. It is clear that a judgment in the case supposed would have no effect at the date of its entry. So far as the creditor is concerned, he would not be bound to accept the judgment as the measure of his rights. It would not bar an action brought by him on the same *gravamen*, nor would it even estop the party by whom the confession was made from denying any or all the facts set forth in it. A judgment without parties, or a judgment, however perfect in form, which is attended with none of the consequences of a judgment, can be a judgment only by pretension. It may be admitted, where a debtor confesses judgment without the request or knowledge of his creditor, and the creditor thereafter ratifies it by claiming under it and attempting to enforce it, that the record will become binding as between the parties to it,—by force of the ratification; and that by relation the judgment as to them would be considered as good from the date of its entry. But such ratification can neither override nor in any manner affect rights acquired prior to the ratification and while the judgment was one only in name. To hold otherwise would be to go counter to all analogy, and would be subversive of authority which it is now too late to question. The case of *Bayley v. Bryant*, 24 Pick. 198, cited for the appellants, is not opposed to the views which we have presented; for the decision in that case was put upon the ground, first, that the first attachment suit was brought in effect by the direction of the creditor; or that failing, then upon the ground that both the suit and the attachment were ratified by the creditor before the second attachment was made.

2. The court further found that the actual indebtedness of Burton and McCarty to C. H. Burton, at the time when the note mentioned in the confession was executed, was \$9,803.78 less than the amount for which the note was given, and that said excess was included in the note for the purpose of defrauding creditors. These facts being given, the judgment is unquestionably void: *McKenty v. Gladwin*, 10 Cal. 227; *Scales v. Scott*, 13 Id. 76. There is little or no positive evidence to support the finding upon which the conclusion proceeds, but the circumstantial evidence in favor of its correctness is entitled to the gravest consideration.

3. But further: the note is misdescribed in the judgment and in the statement on which the judgment is founded. The note

was for \$27,545.81, at two per cent per month interest; and it is described as a note for \$27,000 at one and one half per cent interest, and the facts out of which the indebtedness arose are not set forth in the statement with proper precision. By reason of these defects, and on the authority of *Richards v. McMillan*, 6 Cal. 419 [65 Am. Dec. 52], *Cordier v. Schloss*, 12 Cal. 143, and *Cordier v. Schloss*, 18 Id. 576, the court held that the judgment was *prima facie* fraudulent, and that the burden of rebutting the presumption was upon the party claiming under the judgment. Now, the confession states that the indebtedness for which the note was given was for "services and advances," and it behooved the creditor to prove that at the date of the note Burton and McCarty were indebted to him for "services and advances" in the sum of \$27,545.81. But the defendant (C. H. Burton) was estopped by his answer from proving the proposition, — for he had averred therein that the amount for which the note was given was not due him for "services and advances," but for services and advances and interest thereon (\$9,419.04), at the rate of two per cent per month, under a special agreement to that effect. The defendant, however, was allowed to go into proof of the interest item, and the court has found that as to \$2,102.44 parcel thereof, the interest was cast upon the amount due for service, and in the absence of any contract, either written or verbal; and it may be added that the defendant, in his answer, in stating the contract for interest, limits the interest to "advances." Our purpose, however, is not to make any use here of the finding of the court on the question of interest.

For the purposes of the argument, at this point it may be assumed that the finding was a false finding, and that the \$9,419.04 was lawfully due as interest on the principal claims at the time the note was executed; and that Burton and McCarty had reference to that item in settling in their own minds the amount of the judgment to be confessed. Still, these facts cannot be considered in the defendants' favor, for the reason that they contradict the terms of the confession, and demonstrate a fraud, consisting at once in a suppression of the truth and in a suggestion of what was manifestly false. In stating that Burton and McCarty were indebted to C. H. Burton in the sum of twenty-seven thousand dollars for "services and advances," a "suggestion" was made, which all the answers show to have been false, for they all aver that when the note was given there was only \$18,126.77 due on the

grounds named in the statement; and though \$27,545.81 may have been due at the giving of the note, still, by the answers, there was a suppression of the truth also; for the confession, by the hypothesis, disclosed less than two thirds of the true basis of the indebtedness; thereby putting C. H. Burton in a position to bring an action for the non-performance of the interest contract alleged, unembarrassed by the judgment. A judgment by confession merges no claim of the creditor, except such as are included in it by some form of direct statement; and interest is neither a "service" nor "advance." The cases of *Richards v. McMillan*, 6 Cal. 419 [65 Am. Dec. 521], and *Cordier v. Schloss*, 12 Id. 143, S. C., 18 Id. 576, have no bearing upon the point which we are now considering. In each of those cases the statement was defective, because it was too general, and the judgments were held to be fraudulent *prima facie* for that reason; and it was further considered that the party might supply the omitted details by testimony to be produced at the trial. The point adjudged is, that particular facts lying within the scope of the general terms used in a confession may be brought forward by averment. If the confession states a "promissory note" (implying a consideration), or "services" or "advances," or both, as the source or ground of indebtedness, the creditor, always keeping within the limits of the terms used, may prove all matters explanatory. Beyond this he cannot go. To allow him to go further, and prove a claim which the statement not only does not include, but excludes by necessary intendment, would be to allow him to prove his judgment to be "virtuous," *Richards v. McMillan*, 6 Cal. 421 [65 Am. Dec. 521], by proving it to be false; and to this solecism we may add, that such license of proof would violate every rule of evidence applicable to the question, and invite a perpetration of the very frauds against which the statute was intended to guard.

2. As to the judgment confessed in favor of Spillman.

For reasons kindred to those already stated, we cannot set aside the findings of the court in their bearings upon this judgment on the ground that they are not supported by the evidence. It is true, there was no lack of positive testimony in favor of its integrity, but the court below evidently more than doubted its truth in view of the logic of the events proved. As to the legal effects of the facts found there can be no question.

It is urged that the court examined the account of Spillman

in the books of Burton and McCarty after the case was submitted, the books not having been given in evidence. Were this imputation true as fact, no advantage could be taken of it on this appeal, however Spillman may have been prejudiced by it, and for the reason that the "irregularity" (Practice Act, sec. 193) is not stated in the record as one of the grounds upon which the motion for a new trial would be made. But it is established, both by the statement and by a special certificate of the judge, that the books were in evidence in fact; and as to the newly discovered evidence, the affidavits disclose nothing new except the mistake of defendants' counsel in supposing the books were not put in evidence at the trial.

SAWYER, J., expressed no opinion.

WHERE EVIDENCE IS CONFLICTING, NEW TRIAL WILL NOT BE GRANTED on the ground that the verdict is against evidence: *Templin v. Iowa City*, 81 Am. Dec. 455, and note 456; *Keane v. Connovan*, 82 Id. 738, and note 747; *Inhabitants of Readfield v. Shaver*, 79 Id. 592; *White v. Todd's Valley Water Co.*, 68 Id. 338.

JUDGMENT BY CONFESSION IS BINDING upon parties thereto, though entered upon a defective statement: *Bryan v. Miller*, 75 Am. Dec. 107.

STATEMENT FOR JUDGMENT UPON CONFESSION setting forth a note as the indebtedness is insufficient to support the judgment as against subsequent judgment creditors, when: *Dunham v. Waterman*, 72 Am. Dec. 406, and note 415; *Bryan v. Miller*, 75 Id. 107, and note.

JUDGMENT BY CONFESSION, when and how may be attacked by creditors: *Dunham v. Waterman*, 72 Am. Dec. 406; *Meeker v. Harris*, 79 Id. 215, note 218; *Nichols v. Kribs*, 76 Id. 294. Voluntary confession of judgment on a note executed and delivered by a debtor to his creditor for a sum greater than is due, for the purpose of defrauding creditors, is fraudulent and void as to them: *Tully v. Harloe*, 35 Cal. 308, citing the principal case.

JUDGMENT CONFESSED BY DEBTOR in favor of a creditor, upon a statement not fully setting forth the facts as to the source of indebtedness, is *prima facie* fraudulent as to other creditors, but may be supported by evidence showing the transaction to have been *bona fide*, and that the judgment was rendered upon an indebtedness in fact due. Such judgment cannot be attacked collaterally, and is valid until vacated by a direct proceeding: *Lee v. Figg*, 37 Cal. 336, citing the principal case. So where the statement upon which the judgment is confessed is substantially defective in omitting to show the consideration of a note, the source of indebtedness. This raises a presumption that such judgment is void as to other creditors. This presumption may be rebutted by proving the essential facts omitted from the statement, but the facts shown must be consistent with and in support of the facts alleged in the statement: *Pond v. Davenport*, 44 Id. 487, also citing the principal case.

HALL v. AUBURN TURNPIKE COMPANY.

[27 CALIFORNIA 255.]

OFFICERS OF CORPORATION HAVE NO POWER to authorize the execution of a note as surety for another in respect to a matter having no relation to the corporate business; and a party receiving such note with notice cannot recover on it.

OFFICERS OF CORPORATION HAVE NO POWER to make or ratify a note given by one of their number to secure his individual indebtedness.

WHERE IN ACTION BY PAYEE ON NOTE, given by one of the directors of a corporation for his individual indebtedness, and ratified by all of the other directors in the name of the corporation, the answer denies that the making and delivery of the note is the act of the corporation; evidence establishing such fact is admissible.

THE opinion states the case.

Tuttle and Fellows, for the appellants.

Tweed and Craig, for the respondent.

By Court, SAWYER, J. This is an action on two promissory notes, claimed to have been executed by defendant in favor of plaintiffs. Judgment was rendered for plaintiffs on the first note set out in the complaint, and against them on the second. Plaintiffs appeal from the judgment.

The court finds as follows, viz.: "The second note set up in the second count of the complaint was given to secure the personal indebtedness of one E. M. Banvard to plaintiffs, and no part of the consideration of said note was received by defendant, or went to its benefit. The said Banvard was individually indebted to plaintiffs, who wanted security for such indebtedness, and the note in question was given as such security. After the note was given, it was ratified and approved by the board of directors of said turnpike company, defendant, by an order spread upon the minutes to that effect."

The officers of a corporation have no power to authorize the execution of a note as surety for another in respect to a matter having no relation to the corporate business, and in which the corporation has no interest. Such a transaction is not within the scope of its business, and a party receiving such note, with notice of the circumstances under which it is given, cannot recover on it: 1 Parsons on Notes and Bills, 166; *Bank of Genesee v. Patchin Bank*, 13 N. Y. 309; Angell and Ames on Corporations, secs. 257, 258. The note in question was given to plaintiffs for a debt due them from Banvard, one of the

directors of the corporation, and creates no liability in the plaintiffs' hands against the corporation. The directors acted without authority in making and ratifying the note, and it is therefore not the note of the corporation.

The only other point is, that the evidence showing the note to have been given for a debt due from Banvard was improperly admitted, for the reason that the facts constituting the defense were not pleaded. The answer denies the making and delivery of the note by defendant, and the evidence introduced establishes the fact that the making and delivery of the note was not the act of defendant. It shows that there never was any liability. There is no confession and avoidance. The evidence was admissible under the issues.

Judgment affirmed.

CORPORATION IS NOT BOUND BY UNAUTHORIZED CONTRACTS of its officers: *Mount Sterling etc. Road Co. v. Looney*, 71 Am. Dec. 491. And as to the effect of the ratification of such contract, see *Blen v. Bear River etc. Mining Co.*, 81 Id. 132, and note 137.

NOTE ADOPTED AND SANCTIONED BY CORPORATION as indicative of its contracts, whether binding: *Melledge v. Boston Iron Co.*, 51 Am. Dec. 59.

THE PRINCIPAL CASE IS CITED with approval in *Hall v. Crandall*, 29 Cal. 572, to the point that a corporation is not bound by the unauthorized contracts of its agent.

THE PRINCIPAL CASE IS DISTINGUISHED in *Seeley v. San Joaquin I. M. & L. Co.*, 59 Cal. 24.

MEGERLE v. ASHE.

[27 CALIFORNIA, 322.]

LEGISLATIVE GRANT PASSES TITLE TO GOVERNMENT LANDS as effectually as a patent.

UNITED STATES PATENT IS NO HIGHER EVIDENCE OF TITLE than a prior legislative grant.

GRANT OF FIVE HUNDRED THOUSAND ACRES of land under act of Congress of September 3, 1841, to each new state upon its admission into the Union, imports a present grant, and the title to the lands granted passes upon the admission of the state, although it does not attach to any particular parcel until selected and located by the officers or agents of the state, and approved by the United States.

WHEN PARTICULAR PARCEL OF LAND is selected by the state, through her officers or agents, as a part of the five hundred thousand acres granted by the United States to each new state upon her admission into the Union, and such selection and location are approved by the United States, the title becomes perfect, and attaches to the tract selected. Such title then vests in the state or her grantee, and prevails over that asserted by the holder of a subsequent United States patent.

PARTY CLAIMING TITLE TO PARTICULAR PARCEL OF LAND through the state, under the act of Congress granting to each state five hundred thousand acres of land upon her admission into the Union, is obliged to show, as against one claiming title under a subsequent United States patent, the performance of all acts required by law to constitute the selection and location of the land.

IN EJECTMENT, WHERE PLAINTIFF OFFERS IN EVIDENCE a United States patent and rests, defendant is entitled to offer in evidence a prior patent from the state, and in connection therewith to prove that the recitals in the patent are true, showing that the land has been properly selected and located by the state from a part of the grant to the state by act of Congress of September 3, 1841.

THE opinion states the facts.

Patterson, Wallace, and Stow, for the appellants.

Tyler and Cobb, for the respondent.

By Court, RHODES, J. The plaintiff claims title to the premises in controversy through a patent issued to him by the United States, September 1, 1863; and the defendants claim title under a patent issued by the state of California, January 8, 1862, to Terry, the grantor of Ashe. The plaintiff having introduced his patent rested, and the defendants then offered in evidence the patent from the state to Terry, and in connection therewith offered to prove by independent evidence that the statement and recitals in the patent were true, which were in substance that the land had been properly selected and located by the state, as a part of the five hundred thousand acres of land granted to the state by the act of Congress of September 3, 1841, and that Terry was entitled to receive a patent from the state for the lands described in the patent. The premises described in the two patents were identical. The court excluded the patent and the evidence offered in connection with it, and the defendants excepted.

In support of the ruling of the court the plaintiff advances two propositions: "1. That a United States patent is conclusive evidence of legal title in the patentee in an action at law as against everything except a prior patent from the same source of title; and 2. That a patent of the United States cannot be attacked except for fraud or mistake, and for those only in the United States courts." If the first proposition cannot be maintained the consideration of the second will be unnecessary, for if the patent is not absolutely conclusive it will be deemed to have been issued without authority of law,—through fraud or mistake,—as against a title that

passed from the same source of title prior to the date of the patent. The first proposition assumes that the title of the United States can pass only by a patent, for the learned counsel would not contend that the patent would be conclusive as against a prior title derived from the United States simply because the title did not issue in the form of a patent. This assumption stands opposed to a long series of decisions of the supreme court of the United States, as well as that of several of the states. In *Rutherford v. Greene*, 2 Wheat. 196, in which the title of General Greene to the twenty-five thousand acres granted to him by the act of the legislature of North Carolina was in issue, it being objected that the grant was not complete, because not attested by an instrument having the seal of the state attached, Mr. Chief Justice Marshall, in delivering the opinion of the court, said that "the court would certainly have thought it unnecessary to advert to it [the objection] had not the argument been urged repeatedly, and with much earnestness, by counsel of the highest respectability." A legislative grant is as effectual to pass the title to lands, in all respects and for every purpose, as a grant evidenced by a patent: *Lessieur v. Price*, 12 How. 59; *Kernan v. Griffith*, 27 Cal. 88; *Summers v. Dickinson*, 9 Id. 554; *Owens v. Jackson*, 9 Id. 322. The patent, therefore, being of no higher grade, as evidence of title, than a legislative grant, is not conclusive as against a person claiming under a grant made by the legislative department prior to the adverse patent. It may be remarked, also, that the act of Congress makes no provision for the issuing of a patent to the state or her grantees, and if one should be issued it would amount to no more than a further assurance.

For the purpose of determining the question of the admissibility of the evidence offered by the defendants, it is necessary to ascertain in what manner the title to any particular tract of land passes to the state or her grantee under the act of Congress of September 3, 1841; for if the evidence tended to show that the title to the tract in controversy passed to the state or her grantee prior to the date of the plaintiff's patent, the court erred in excluding the evidence.

The eighth section provides that "there shall be and hereby is granted to each new state that shall be hereafter admitted into the Union, upon such admission, so much land as, including such quantity as may have been granted to such state before its admission and while under a territorial government,

for purposes of internal improvements, as aforesaid, as shall make five hundred thousand acres of land, to be selected and located as aforesaid." The language, "hereby is granted," as has uniformly been held by the courts, imports a present grant. The title to the amount of land specified in the act passes upon the admission of the new state, though "wanting identity to make it perfect"—to attach it to a particular parcel of land: *Lessieur v. Price*, 12 How. 59; *Rutherford v. Greene*, 2 Wheat. 196; *Terry v. Megerle*, 24 Cal. 609 [85 Am. Dec. 84]. The legislature of a state must thereafter provide by law for the performance by her officers or agents of the acts that may be requisite to indicate a selection of the tracts of land which, in the aggregate, will constitute the amount of land granted to the state by the act of Congress. When a particular parcel of land has been "selected and located" in accordance with the provisions of the act of Congress,—when the selection and location have been made by the proper officers or agents, acting on behalf of the state, in such manner as the legislature has directed, and on public lands that at the time are subject to such location, and the selection and location have been approved by the proper authorities of the United States,—then the identification of the land has made the title perfect, and attached it to the particular tract selected. The title thus perfected and attached to the land vests in the state, or her grantee, and all the interest the United States had in the particular parcel is held by the state or her grantee by a title superior to that asserted by the holder of a subsequent patent issued by the general government.

A person claiming title under the act of Congress, through the state, would be obliged to show, as against one claiming under the United States through a patent issued in accordance with the general regulations for the sale of public lands, the performance of the acts required by law to constitute the selection and location of the land. This the defendant was proceeding to do when objection was made by the plaintiff. We do not undertake to say that the evidence offered by him would have been sufficient to have sustained his claim of title and upheld his patent from the state; but the offer to show that the recital was true, that the land had been "duly and properly located in accordance with the provisions of the said laws of this state," though general in its terms, certainly included several of the steps necessary to be taken in making the selection and location of the land. The refusal of evi-

dence of the character offered would subject every title to portions of the five hundred thousand acres of land derived from the state to the liability of being defeated by subsequent patents issued by the United States.

The patent from the state was also admissible in connection with proof of the due selection and location of the land. We therefore hold that the decision of the court in excluding the evidence offered by the defendants was erroneous.

Judgment reversed, and the cause remanded for a new trial.

FEE IN LAND DISPOSED OF BY UNITED STATES remains in the government until the patent issues: *Carman v. Johnson*, 61 Am. Dec. 593.

POWER OF UNITED STATES OR STATE over lands within a state: *State v. Bachlaer*, 80 Am. Dec. 410, and note.

PATENT AS EVIDENCE: *Kittridge v. Breaud*, 39 Am. Dec. 512, note 516.

AS BETWEEN CONFLICTING PATENTS, FIRST MUST PREVAIL: *Parkinson v. Bracken*, 39 Am. Dec. 296; *Overton's Heirs v. Davison*, 42 Id. 544.

LEGISLATIVE OR STATE GRANT, EFFECT OF: *Proprietors etc. v. Permit*, 31 Am. Dec. 207; *Tymannus v. Williams*, 46 Id. 69.

THE PRINCIPAL CASE IS AFFIRMED in *Megerle v. Ashe*, 33 Cal. 74; and as to the questions involved in the former the latter has been cited in *Burrell v. Haw*, 40 Id. 377, to the point that a claimant of public lands must show that all conditions necessary to enable him to pre-empt, before he can question the proceedings through which defendant claims title. In *Smith v. Athern*, 34 Id. 514, it is cited to the point that where parties claim under conflicting patents, defendant claiming under one of prior date, plaintiff can overcome such title only by showing a better equity in himself; this he may do by showing prior occupation and settlement, followed by proper proceedings, resulting in a patent to himself. So under a general denial in ejectment, defendant may show from what source he derived title, where there are conflicting claims under patents of different dates: *Hestres v. Brennan*, 37 Id. 389.

PUBLIC LANDS ARE NOT LIABLE TO LOCATION until surveyed. Therefore the location of a warrant on unsurveyed lands is void: *Smith v. Athern*, 34 Cal. 512. And the statute of 1852, so far as it provided for the disposition of the grant spoken of in the principal case, is void, as the land at that time was unsurveyed: *Roberts v. Columbet*, 63 Id. 24, both citing the principal case.

WHEN SELECTION AND LOCATION HAVE BEEN MADE from lands subject thereto, out of the grant of five hundred thousand acres received by the state by act of Congress, the general gift of quantity becomes a particular gift of the specific land located, and vests in the state an absolute and perfect title thereto, which passes by a patent from the state: *Bludworth v. Lake*, 33 Cal. 262, citing the principal case.

DE UPREY v. DE UPREY.

[27 CALIFORNIA, 229.]

COMPLAINT IN PARTITION IS GOOD which contains only general allegations that the premises cannot be divided by metes and bounds without prejudice, and does not state the facts showing why such partition cannot be made.

COMPLAINT IN PARTITION IS GOOD which is silent as to the particular mode of partition sought.

WHETHER PARTITION CAN OR CANNOT BE MADE by metes and bounds is the only necessary averment in a complaint for partition, as that is purely a question of fact and the ultimate fact to be found. The constituent facts, or those which lie behind, are probative, and need not be averred.

IN ACTION FOR PARTITION where the wife claims a homestead right or an interest in the premises, she is not only a proper but a necessary party to the proceedings.

ALL PARTIES HAVING OR CLAIMING ANY INTEREST in the land are not only proper, but necessary parties to a suit in partition.

DISCLAIMER CONTAINED IN ANSWER, to be effective, must be absolute and unqualified. Less than this, plaintiff is not bound to accept.

WHERE PARTY SUED IN PARTITION disclaims, in his answer, all interest in the land, except a homestead interest held by himself and wife, such disclaimer is not sufficient to entitle him to a dismissal of the action.

IN ACTION FOR PARTITION, defendant cannot defeat the action, nor is he entitled to have it dismissed, by the mere force and effect of his answer, no matter what it contains.

IN ACTION FOR PARTITION, any question affecting the right of the plaintiff, or the rights of each and all of the parties in the land, may be put in issue, tried, and determined in the action.

IN ACTION FOR PARTITION, where the complaint alleges that the parties are co-tenants, the findings of the court must correspond with the allegations of the complaint only so far as to show that the parties hold and are in possession of the land as joint tenants or as tenants in common, and that one or more of them has an estate of inheritance, or for life or lives, or for years. Partition may be had, although either of the parties may have set forth his interests incorrectly.

THE opinion contains the facts.

Grey, for the appellants.

Campbell, for the respondent.

By Court, SANDERSON, C. J. This is an action for the partition of a certain lot and improvements in the city of San Francisco. The plaintiff obtained judgment and a decree directing the premises to be sold and the proceeds divided between the parties, on the ground that a partition by metes and bounds could not be made without prejudice. The defendants appeal, and assign several errors, which we will notice in the order in which they have been presented.

The action was commenced against Samuel De Uprey alone, who demurred to the complaint, and for cause of demurrer alleged that the same did not state facts sufficient to constitute a cause of action. The demurrer was overruled, which ruling constitutes the first error assigned.

The only ground urged in support of the demurrer is that the complaint contents itself with the general allegation that the premises cannot be divided by metes and bounds without prejudice, and does not state the facts showing why such a partition could not be made. A complete answer to this is found in the fact that the manner in which the partition is to be made constitutes no part of the cause of action, but is merely a part of the relief. While it is proper and perhaps advisable to ask for a particular mode of partition,—there being two provided by the statute,—and to that end allege the facts upon which the plaintiff relies for the particular mode which he seeks, yet this is not indispensable, and a complaint which is silent upon the subject is good. No facts need be stated in the complaint except such as are found enumerated in the 264th section, which provides for the cause of action in question, and defines the facts upon which it rests; and a specification of the interest of each party interested in the land, so far as known to the plaintiff, as provided in section 265. If these sections left the question in doubt, such doubt is entirely removed by the 275th section, which provides that: "If it be alleged in the complaint and be established by evidence, or if it appear by the evidence without such allegation in the complaint, to the satisfaction of the court, that the property or any part of it is so situated that partition cannot be made without great prejudice to the owners, the court may order a sale thereof." But were it otherwise, and were the theory of the appellant the correct one, we should still be of the opinion that his theory is fully satisfied by the complaint in this case. Whether a partition can or cannot be made by metes and bounds is purely a question of fact, and is the ultimate fact to be found, and therefore the only fact necessary to be averred under any system of pleading with which we are acquainted. The constituent facts, or those which lie behind, are merely probative, and need not be averred. But independent of all that has been said, it may be safely affirmed that the bare description of the premises contained in the complaint sufficiently shows that a partition by metes and bounds could not be made without prejudice. It is a city lot, fronting an

alley, measuring only twenty-three feet front, and extending back sixty. We think it would be difficult to divide such a lot by metes and bounds without great prejudice to the owners.

After the demurrer to the complaint was overruled, the plaintiff, upon affidavit and notice, moved the court for leave to bring in the wife of the defendant by a supplemental complaint. The motion was allowed by the court against the exception of the defendant, and it is next contended that this order of the court was erroneous.

We cannot but regard this point as frivolous. Mary Ann De Uprey, as appears by her own answer, not only claimed a homestead right to the premises, but claimed that the entire legal estate was in her, and the court found that the legal title to an undivided half was in her. She was therefore not only a proper party, but a necessary party, to the complete determination of the case. All persons having or claiming any interest in the land are not only proper but necessary parties to a suit for partition; and it was not only proper for the court to allow the motion in question, but it would have been error not to have done so: Practice Act, secs. 17, 68. Admitting, for the sake of the argument, that the showing in support of the motion was insufficient, subsequent events clearly demonstrated the fact that she was a necessary party, and that the ends of justice had been subserved by allowing the amendment. Such being the case, this court will not disturb an order resting very much in the discretion of the court below, and exercised under a statute containing very liberal provisions upon the subject of amendments.

After the amended and supplemental complaint was filed, the defendants separately demurred, upon the grounds following: 1. Misjoinder of parties defendant, because Mary Ann De Uprey was improperly joined; 2. Because several causes of action had been improperly united; 3. Because the complaint did not state facts sufficient.

The demurrers were overruled, which ruling constitutes the third error assigned.

These demurrers were not only frivolous, but under the circumstances of the case, impertinent. The court had already decided that Mary Ann was a proper party, and therefore making her such could not result in a misjoinder. The court had also decided that the original complaint stated a cause of action, and it is clear that it, together with the amended and supplemental, does not state less facts than at first. And so

far as the second ground alleged is concerned, we cannot perceive that the demurrer has even a respectable pretext to stand upon. It is obvious upon inspection that there is but one cause of action stated in the complaint, and but one kind of relief sought.

This case was certainly contested with a pertinacity worthy of a better cause. After all the demurrers, five in number, had been overruled, and the defendants had both answered separately, denying all the allegations of the complaint, their counsel next moved to dismiss the case upon the pleadings, without any trial of the issues of fact thus joined between the parties. In view of the fact that the sufficiency of the complaint made by the plaintiff had undergone the test of five demurrers, and the further fact that answers, in the absence of all evidence either way, are entitled to no more faith and credit at the hands of the court than complaints, this motion has at least the merit of novelty.

But it is argued in support of the motion that the pleadings show no cause of action as against Samuel De Uprey, because he disclaimed any interest in the land. Such, however, does not appear to be the fact. His answer does not contain an absolute and unqualified disclaimer. Less than that the plaintiff was not bound to accept. He only disclaims all interest except such as he may have under the homestead law by virtue of the dedication of the land to homestead uses by himself and his wife. It may be that such interest did not amount to anything in law, but that was one of the questions which he had helped to make, and which the plaintiff had a right to have determined and put to rest by the judgment of the court. But be that as it may, he could not claim a dismissal of the action upon the ground of a disclaimer, unless he made that disclaimer in absolute and unconditional terms. Instead of doing that, he denied all the allegations of the complaint as to the plaintiff's title, pleaded two statutes of limitations, and averred title in his wife, and claimed for himself a right of homestead in the premises, but disclaimed any further interest. It is a misnomer to call such an answer a disclaimer.

The issues made by the answer of Mary Ann De Uprey are: 1. Has the plaintiff any interest? 2. Has Samuel De Uprey any interest? 3. Is Mary Ann sole owner of the premises? 4. Has the plaintiff possession? 5. Has the plaintiff been in possession within five years? 6. Has she been in possession within four years?

We are asked if the foregoing questions are such as are cognizable in an action for partition; and it is argued that they are not, but are such questions as must be tried in an action of ejectment or to quiet title, if at all, and therefore this case ought to be dismissed on the pleadings, without first ascertaining by a trial whether there is a word of truth in the answer which raises those questions,—a conclusion both lame and impotent. The action being confessedly for a partition, so far as the complaint is concerned, we are certainly unable to perceive how the defendants can defeat the action by the mere force and effect of their answers, no matter what they contain. Nor, admitting such to be the fact, are we able to perceive by what rule of law or logic the plaintiff is to be held responsible for what appears in the answer, and sent out of court because the defendants have seen proper to raise questions not cognizable, as they alleged, in an action for partition. On the contrary, if the questions made by the answer are not cognizable in this action, it is not the fault of the plaintiff, but of the defendants, and they ought not to have been allowed to make them. But there is nothing in the idea that these questions are of “strange countenance” in an action for partition. Any question affecting the right of the plaintiff to a partition, or the rights of each and all of the parties in the land, may be put in issue, tried, and determined in such action: Practice Act, sec. 271. Such is one of the fruits of the new system of practice which we have adopted, and when contrasted with the practice in such cases at common law, serves to illustrate its superiority.

It is next insisted that the findings negative the averments of the complaint, and the doctrine that the *allegata* and the *probata* must correspond is invoked for the purpose of establishing an error in that respect. The complaint averred that Samuel De Uprey was the co-tenant of the plaintiff, and owned an undivided half of the premises, but upon the trial the court found that this undivided half did not belong to Samuel, but to Mary Ann, and for that reason we are asked to reverse the judgment. This is substantially the same question which we have already twice considered in a different form, and which seems to play the part of Banquo's ghost in this judicial drama. We know of no rule of law which requires the court, in an action of this kind, to find the facts as alleged or the contrary, and not otherwise, nor any rule which cuts off the plaintiff's right to a partition because it turns out on the trial

that he was mistaken as to the condition of the title of his co-tenants. The plaintiff is required to set forth the interests of all parties, known or unknown, as far as they are known to him (section 265), and each defendant is required to set forth in his answer, fully and particularly, the nature and extent of his interest. But suppose that either or both, through mistake or otherwise, set forth their interests incorrectly, it does not follow that no partition can be had. The partition follows all the same, and is to be made according to the finding, regardless of the fact whether such finding corresponds with the allegations of the complaint in that respect. The doctrine invoked is applicable to this kind of an action only so far as the facts upon which the right to a partition is founded are concerned, and which are set forth in the 264th section of the statute. The finding must correspond with the allegations of the complaint so far as to show that the parties—plaintiff and defendant—hold and are in possession of the land in question as joint tenants or as tenants in common, and that one or more of them has an estate of inheritance or for life or lives or for years. Such are, so to speak, all the issues which are directly and in chief involved in this action, and upon them, if found in favor of the plaintiff, the judgment of the court is, that partition be made. But in order that this judgment may be executed, it is necessary to ascertain what the interests of the respective parties are, if there is any controversy touching them. These latter issues are collateral to the former merely, and do not enter into and become a part of the action within the scope of the rule which counsel have invoked. Whether the finding upon them corresponds with the issues made by the parties or not, is void of legal consequence. The object is not to ascertain whether the allegations of either party in respect to their interests are true or false, but to ascertain what their interests are according to the evidence, in order that the decree of the court directing a partition may be carried into effect.

The record contains no error, and the judgment must be affirmed.

Ordered accordingly.

NECESSARY AVERMENTS IN BILL FOR PARTITION: See *Ramsay v. Bell*, 42 Am. Dec. 163; *Harman v. Kelley*, 45 Id. 552; *Rutherford v. Jones*, 60 Id. 655. And as to how an indefinite description of the premises in the petition may be taken advantage of, see *Godfrey v. Godfrey*, 79 Id. 448.

IN PROCEEDINGS FOR PARTITION, all interested persons are necessary parties: *Batterton v. Chiles*, 54 Am. Dec. 539, and note 547.

IN ACTION FOR PARTITION, all the tenants in common should be joined. In other words, all the grantees of the original owner should be made parties: *Butler v. San Francisco*, 36 Cal. 116, citing the principal case.

IN PARTITION SUIT, BEFORE PARTITION can be made or ordered, the interests and shares of the parties must be adjudged and determined by the court: *Emery v. Alvarado*, 64 Cal. 618, citing the principal case.

IN PARTITION PROCEEDINGS, any question affecting the right of the parties to partition, or of any or all of the parties in the land, may be placed in issue, tried, and determined in the action: *Mowenhaus v. Higuera*, 32 Cal. 294; *Bollo v. Navarro*, 33 Id. 465; *Gates v. Salmon*, 35 Id. 597; *Martin v. Walker*, 58 Id. 593.

TITLE MAY BE TRIED IN ACTION FOR PARTITION: *Bollo v. Navarro*, 33 Cal. 465, 468, citing the principal case.

AGNEW v. STEAMER CONTRA COSTA.

[27 CALIFORNIA, 425.]

IN ACTION AGAINST COMMON CARRIER for the loss of a horse, alleged to have been caused by the bursting of the boilers of a steamer by reason of the negligence of the carrier in racing at the time of the loss, evidence of the good condition of the boilers at such time is not admissible either on the question of liability or of damages.

COMMON CARRIER IS SUBJECTED TO ORDINARY RESPONSIBILITIES connected with his vocation, when the cause of damage for which recompense is sought is unconnected with the subject-matter of the damage.

COMMON CARRIER OF LIVE-STOCK IS INSURER against all injury not resulting from the act of God, or the public enemies, or from the conduct of the animal being transported.

IN ACTION AGAINST COMMON CARRIER for the loss of a horse, alleged to have been caused by the explosion of the boilers of a steamer, while negligently engaged in the act of racing, evidence is inadmissible to show that the boilers were good and sufficient, and that the officers and crew so conducted themselves that the explosion occurred by inevitable accident or unknown causes while the steamer was so engaged.

PRESUMPTION IS AGAINST CARRIER in every case, except when it is made to appear that the injury complained of could not have happened by the intervention of human means.

THE opinion contains the facts.

Sloan, for the appellant.

Barnes, for the respondent.

By Court, SHAFER, J. This action was brought to recover damages for the loss of a stallion by means of the negligence of the defendant as a common carrier between the cities of San Francisco and Oakland.

The plaintiff introduced evidence tending to prove that on the third day of April, 1859, he embarked the stallion on the Contra Costa, at San Francisco, to be carried for him to the city of Oakland. That the horse was put by the captain of the boat opposite the boiler, in the place where horses were usually stationed. That the boiler of the steamer exploded on the passage, and that the horse was so far injured by the explosion that he died on the same day. That the Contra Costa was at the time racing with a rival steamer running between the same termini; that there was betting among the passengers of the Contra Costa, which betting was encouraged by the assurances and conduct of the engineer.

The defendant offered in evidence the deposition of George W. Coffee, "for the purpose solely of showing the condition of the boilers of the steamer." The plaintiff objected to the evidence as incompetent and irrelevant, and the court sustained the objection. The appellant claims that this ruling was erroneous.

Where the cause of the damage for which recompense is sought is unconnected, as was the case here, with the conduct or propensities of the animal undertaken to be carried, the carrier is subjected to the ordinary responsibilities connected with his vocation: *Palmer v. Grand Junction R'y Co.*, 4 Mees. & W. 749; *Clarke v. Rochester and Syracuse R. R. Co.*, 14 N. Y. 574. In the case at bar, the boilers were either sufficient or insufficient. If they were insufficient, proof of the fact could have been of no service to the defendant, of course; and if sufficient, the proper deduction from the fact would be, not that the explosion resulted from the act of God, but from some fault in the management—the very cause to which it was attributed in the theory of the plaintiff's case. The defendant was an insurer against all injury not resulting from the act of God or the public enemies, or from the conduct of the animal; and it follows that the good condition of the boilers had as little to do with the question of liability, and with the question of damages also, as the condition of the rudder or the general stanchness of the ship, the misconduct charged being assumed or given.

Upon the exclusion of Coffee's deposition, the defendant offered to prove "that all skill and care and prudence were used, as far as human foresight would go, and that defendant did in fact provide and have on board a good and sufficient engine and boilers, capable of sustaining a pressure of steam

twice the amount that was in the boiler at the time of the explosion, and that the master, engineer, crew, and defendant so conducted themselves that the explosion occurred by inevitable accident or unknown causes, and against which precaution and skill could not guard." On objection taken by the plaintiff this evidence was also excluded.

As between court and counsel, the offer lacks the simplicity and directness called for by the occasion.

It is complicated and somewhat confused. The plaintiff's case imputed the explosion to the racing and its incidents, and proof was introduced of that misconduct by him, as we must intend, not so much for the purpose of proving the liability (*Boyce v. California Stage Co.*, 25 Cal. 460) as for the purpose of enhancing the damages by interest on the value of the animal: *Watkinson v. Laughton*, 8 Johns. 217. If the defendant proposed to meet the case in this aspect of it, the offer should have been to disprove the particular misconduct imputed. But the offer, as made, does not necessarily impart anything more than an offer to prove that a reckless act was carefully performed.

But there is another aspect under which the question may be presented. Let it be assumed that the purpose was to prove as a proposition of defense that explosion resulted from the *vis major*, and that the proof of the strength of the boilers, and of extraordinary care on the part of officers and crew, was offered for the purpose of supplying grounds of presumption. The answer is, that there is no logical connection between the strength of the boilers and extraordinary care in the management on the one hand and *vis major* propounded on the other, — as little, indeed, as there is between the same facts and the conclusion that the explosion was caused or that the horse was killed by public enemies: *Boyce v. California Stage Co.*, 25 Cal. 460. Proof that the boilers were sufficiently strong would establish merely that the horse was not killed by reason of their weakness. Proof that extraordinary care was used would prove simply that the explosion occurred in spite of it, but it would throw no light upon the question of whether it did or did not result *acto Dei*. Between the point at which extraordinary care on the part of a bailee may be said to terminate, and the point at which "superior force" may be said to begin, there is a wide space for the interposition of other agencies, and the law presumes against a carrier in every case, except it be made to appear that the injury com-

plained of could not have happened by the intervention of human means: *Forward v. Pittard*, 1 Term Rep. 27.

Other errors are assigned, but none that require particular notice.

Judgment affirmed.

BURSTING OF BOILER RAISES PRESUMPTION of negligence against a common carrier: Note to *Farish & Co. v. Reigle*, 62 Am. Dec. 684.

LIVE-STOCK, COMMON CARRIER UNDERTAKING TO TRANSPORT, duty and liability of: *Kimball v. Rutland etc. R. R. Co.*, 62 Am. Dec. 567; *Clarke v. Rochester etc. R. R. Co.*, 67 Id. 205, and extended note 208-217; *Peters v. New Orleans etc. R. R. Co.*, 79 Id. 578, and note 580.

BUCKOUT v. SWIFT.

[27 CALIFORNIA, 433.]

WHERE THERE ARE NO FINDINGS OF FACT IN CASE, it must be presumed on appeal that all the issues of fact raised by the answer were found in favor of the party recovering judgment.

AVERMENTS IN COMPLAINT NOT DENIED must be taken to be true.

HOUSE SITUATED UPON REAL ESTATE at the time that the latter is mortgaged forms a part of the realty, and as such is affected by the mortgage lien.

SEVERANCE OF HOUSE FROM LAND changes the character of the former from real to personal property, irrespective of the means by which the severance was accomplished.

WHILE HOUSE IS YET UPON MORTGAGED LAND, the mortgagor, or those claiming under him, may remove it, and the removal will not be enjoined, except upon proof that the land without the house would be an inadequate security for the mortgage debt.

WHEN HOUSE IS REMOVED FROM MORTGAGED LAND, it is withdrawn from the operation of the mortgage lien, and the mortgagor may sell it, and the purchaser may convert it to his own use

THE opinion states the facts.

Cadwalader, for the appellant.

Crocker, for the respondent.

By Court, SHAFTER, J. On the 4th of October, 1861, Francis P. Swift and his wife, for the purpose of securing the payment of a promissory note made and delivered by him to the plaintiff, mortgaged a lot in the city of Sacramento, on which stood a dwelling-house occupied by Swift and his family, and in which they continued to live until the great flood of 1862, when the house was carried, by the rush of water, into the street a short distance from the mortgaged lot, where it stood

when this action was brought. A short time before the commencement of the action, Swift made a contract with the defendant Lowell to sell him the house, and Lowell was about to remove it when the plaintiff brought this action to foreclose the mortgage and to restrain the removal. It was alleged in the complaint that the house, at the date of the mortgage, was affixed to and formed a part of the realty, and that it was chiefly valuable to be used in connection therewith; and that Lowell bought with full notice of all the facts, and that he was destitute of property. The plaintiff obtained upon his complaint, from the county judge, an order restraining the defendants from selling, taking away, or injuring the house. The order was thereafter dissolved and an injunction refused by the district court, upon the complaint alone.

Thereupon Lowell answered, and at the trial of the cause the court rendered a judgment against the defendant Swift for the amount due on the note, and a decree for the foreclosure of the mortgage, and for the sale of the mortgaged property, excepting the house, and as to that, it was ordered and adjudged that the decree should not affect nor authorize its sale; and the court dismissed the complaint as to Lowell, and gave judgment in his favor. The appeal is from the order dissolving the restraining order and refusing to grant an injunction, and from that part of the decree which dismissed the bill as to the defendant Lowell.

There is a document in the record headed "statement on appeal." Amongst other things it contains the pleadings in the action, an agreement that certain facts detailed were "proved," and a medley of evidence given by the witnesses of the respective parties. On this appeal we can make no reference to the evidence for the purpose of determining whether the judgment is right or wrong. There was no motion for new trial, nor are there any questions arising upon the admissibility of evidence. There are no findings in the case, and we must therefore intend that all the issues of fact raised by Lowell's answer were found in his favor; that is to say, we must intend that the court found that the lot, without the house, "was sufficient security for the debt"; that "the defendant purchased the house of Swift, and fully paid him therefor"; and that "the defendant is possessed of sufficient means to respond in damages at law." There are other issues raised by special denials in the answer, but the denials are either of immaterial averments or involve mere conclusions of law. It

is charged in the complaint that the house was standing upon the lot when the mortgage was made and recorded in October, 1861; that the house was thereafter, in 1862, floated by the flood from off the land into an adjacent street; that the house was the one which Lowell bought; and that the fact of their identity was known to Lowell at the time he purchased. All these averments must be taken as true, for none of them are denied. The facts, which by the statement were "proved," may be laid out of account, for they do not bear upon any question which we shall have occasion to discuss.

In view of the facts admitted by the pleadings, it cannot be doubted that the house was originally real estate, and was affected, as such, by the mortgage lien: 2 Wash. Real Prop. 625. That point we consider to be so fully established by authority as not to admit of discussion. We shall consider the case under two distinct aspects:—

1. Upon the hypothesis that the lien of the mortgage remained upon the house after it took on the character of personal property by severance and removal from the freehold.

So far as legal effect is concerned, it matters not whether the severance was by the act of God or the act of man. The severance, *proprio vigore*, changed the character of the property from real to personal, irrespective of the means by which it was accomplished. If, while the house was yet upon the land, the mortgagor or any one claiming under him had threatened to remove it, and the mortgagee had filed a bill to restrain the removal on the ground of waste, the removal would not have been enjoined, except upon proof that as matter of fact the lot without the house would be an inadequate security. The general rule in equity is, that a mortgagor in possession has the right to cut timber on the lands mortgaged, and to do other parallel acts, and a court of equity will not interfere to restrain him or his assigns in the exercise of that right, until it is made to appear that the cutting, or other like act, is being carried to an extent calculated to render the land an insufficient security for the amount due upon the mortgage: *King v. Smith*, 2 Hare, 239; *Brady v. Waldron*, 2 Johns. 147; *Hampton v. Hodges*, 8 Ves. 105; *Wright v. Atkyns*, 1 Ves. & B. 314; *Van Wyck v. Alliger*, 6 Barb. 511; 2 Story's Eq. Jur., sec. 915. Now, if, in the absence of the facts named, a mortgagor would have the right to withdraw timber growing upon the mortgaged lands from the lien of the mortgage by severing and converting it to his own use, why should he or his vendee, in the absence

of the same fact, be restrained from converting the property after severance, assuming it to be then subject to the lien? The questions are identical. Both bear upon a common point, which is as follows: if the mortgagor is allowed to exercise his equitable right of withdrawing timber, etc., from the operation of an admitted lien, will or will not the security be endangered? No authorities have been cited by counsel bearing directly upon this question, and we have not been able to find any that directly control it; but on the ground of strong and manifest analogy, we consider that both of the cases stated should be taken as subject to the same rule. This conclusion disposes of the appeal upon the hypothesis of the appellant that the house was under the lien of the mortgage after its removal from the land.

2. But we consider that by removal from the land the house was effectually removed from the operation of the mortgage lien.

The mortgage was, by its terms, limited to land as its sole subject-matter; and so long as its terms remained unchanged it could not be made to comprehend anything else.

Again: a building severed and removed from mortgaged lands, of which lands it formed a part when the mortgage was given, is disencumbered of the lien substantially on the same principle that a building erected upon the lands after the giving of the mortgage is subjected to the lien. In the first case, the building is withdrawn from the operation of the mortgage for the reason that it has ceased to be a thing real; in the other, mere materials are brought under the lien for the reason that they have become a structure by combination, and the structure has become a thing real by position. In both cases position is the pivot of judgment.

Again: a mortgagee, as we have already seen, may, under certain circumstances, restrain the mortgagor from cutting and removing timber from the lands covered by the mortgage; but that doctrine goes upon the very ground that if the timber should be cut, or at least, cut and carried away, it would, in its new character of personalty, be withdrawn from the operation of the lien by the sheer force of the change.

Again: if the lien of a mortgage should be held to follow things severed and removed from the freehold, the doctrine would involve a series of notable consequences and investigations. Minerals removed from mines under mortgage, crops, timber, buildings, and the materials, even, of which

the buildings were constructed, when severed and removed from lands under mortgage, could be pursued under proceedings in foreclosure into the hands of all parties, or at least, into the hands of all parties taking with notice. And of what avail would all this be to mortgagees in the large and in the long run? And under what rule should the lien of the mortgage be enforced? Under that applicable to things real? or the one applicable to things personal? Most probably after the method applicable to things real. But in that event, should the property be sold on view or without view by the bidders, and in whatsoever hands it might chance to be? If on view, then under what known process could the sheriff seize, hold, and produce the property at the sale? And if not on view, then could the purchaser call for a writ of assistance if the holder of the property refused to deliver it? And how would it be as to the ordering of redemptions or as to the possibility of any redemption? Would a bill of sale executed by the sheriff pass the title, or would a deed be necessary? and if the latter, then would the things personal be included by intendment in a deed of the *terra firma*? or should they be specially mentioned therein?

But we consider it unnecessary to push the general reasoning further, for the question presented was met and determined in *Codrington v. Johnstone*, 1 Beav. 520. It was held in that case that a mortgagee taking possession, or a receiver appointed on his behalf, is not entitled to crops of the estate previously severed and consigned by the mortgagor, though not actually received by the assignee.

We hold, then, on principle and on authority, that when the house in question was removed from the land, it was withdrawn from the operation of the mortgage lien, and that the mortgagor had the right to sell it, and that Lowell had the right to buy and to convert it to his own use.

Judgment affirmed.

SAWYER, J., expressed no opinion.

FAILURE TO ANSWER ADMITS ALLEGATIONS in the bill: *Hasty v. Blackford*, 25 Am. Dec. 114; and a defense not set up in the answer is of no avail: *Feld v. Mayor etc. of New York*, 57 Id. 435, and note 442.

FIXTURES SEVERED AND REMOVED from mortgaged premises are freed from the mortgage lien: *Hill v. Gwin*, 51 Cal. 50, citing the principal case.

TENANT WILL NOT BE RESTRAINED from removing a house from the premises on the ground that the security for rent will be thereby impaired. *Te*

maintain the action, it must be shown that the security will be rendered inadequate by the removal; to show that it will be lessened in value is insufficient: *Perrins v. Marsden*, 34 Cal. 18, citing the principal case.

BUILDING BLOWN DOWN remains part of realty: *Rogers v. Gillingham*, 72 Am. Dec. 694, note 697.

PEOPLE v. KING.

[27 CALIFORNIA, 597.]

INDICTMENT FOR MURDER UNDER CRIMINAL CODE of California need not describe the weapon used, the nature or extent of the wound, nor the part of the body upon which it was inflicted.

CRIMINAL CODE OF CALIFORNIA WORKS SAME CHANGE in the pleading and practice in criminal actions which is wrought by the civil code in civil actions.

INDICTMENT FOR MURDER UNDER CRIMINAL CODE of California is not bad because it designates the degree of the murder. This may be treated as surplusage; but the indictment ought not, because it need not, state the degree of the murder.

TO RENDER JUROR INCOMPETENT ON GROUND of implied bias, it must appear that he entertains a fixed and settled conviction of the guilt or innocence of the defendant, or that he has expressed such a conviction. Whatever falls short of this does not amount to an unqualified opinion within the meaning of the statute.

IN MURDER TRIAL, IF THERE IS NO EVIDENCE which tends to reduce the crime charged to manslaughter, the court may instruct the jury to disregard the question of manslaughter; but if any evidence is given tending, however slightly, to reduce the homicide to manslaughter, such instruction is erroneous.

WEIGHT OF EVIDENCE UNDER CALIFORNIA CONSTITUTION is left entirely to the jury, and the court is not allowed to express an opinion in relation thereto, although it may state what facts are in evidence and what are not.

COURT MAY STATE TESTIMONY and declare the law, although it is erroneous to charge in respect to matters of fact.

INSTRUCTIONS OF LOWER COURT WILL BE PRESUMED to have been correct, in the absence of any statement or bill of exceptions on appeal embodying the evidence or declaring its purport or tendency, so far as is necessary to point the exception, unless such instructions are manifestly erroneous under any and every conceivable state of facts.

IN MURDER TRIAL, WHERE DEGREE OF OFFENSE depends upon whether the killing was willful, deliberate, and premeditated, the jury may properly be instructed to consider evidence of intoxication, not upon the ground that drunkenness renders a criminal act less criminal, or can be considered in extenuation or excuse, but to determine the condition of the defendant's mind, as to whether he was capable of deliberation or premeditation necessary to the degree of the crime charged.

IT IS NOT ERROR TO REFUSE TO GIVE INSTRUCTIONS which have already been given in substance.

INDICTMENT for murder. The opinion contains the facts.

Berry, for the appellant.

McCullough, attorney-general, for the people.

By Court, SANDERSON, C. J. The objections to the indictment are not well taken. There is some conflict in the decisions in this state as to what must be alleged in an indictment for murder. Some of the cases go so far as to hold that the essential averments of an indictment under our criminal code are the same as at common law, and that therefore a statement of the manner of the death and the means by which it was effected is indispensable: *People v. Wallace*, 9 Cal. 30; *People v. Cox*, 9 Id. 33; *People v. Lloyd*, 9 Id. 54. In other cases it has been held that our criminal code changes in many respects the rule of the common law, and dispenses with the statement of many facts and circumstances connected with the killing which were usual and perhaps indispensable at common law: *People v. Stevenston*, 9 Id. 273; *People v. Dolan*, 9 Id. 576. In the former case it was held that a description of the weapon used was not necessary, and it was not material to describe the wound further than by the use of the word "mortal," nor the part of the body upon which it was inflicted. And it seems that it is not necessary to aver in terms that the wound was mortal, for if the facts stated show that such was the fact (as that the party died of the wound), the indictment in that respect is sufficient: *People v. Judd*, 10 Id. 313.

Our criminal code was designed to work the same change in pleading and practice in criminal actions which is wrought by the civil code in civil actions. Both are fruits of the same progressive spirit which, in modern times, has endeavored, at least, to do away with the mere forms and technicalities of the common law, which were productive of no good, and frequently brought the administration of justice into contempt by defeating its ends. Under the pretense of informing the defendant of the nature of the charge against which he was called upon to defend, it was necessary, at the ancient common law, to describe the means by which the homicide was committed, and the nature and extent of the wound, and its precise locality; from which it necessarily followed that a trifling variance between the proof and the allegation frequently defeated a conviction, no matter how manifest the guilt of the defendant. It was a long time before legislators and judges discovered that this rule had nothing but the most flimsy pretext to support it. If the defendant is guilty, he stands in need of no

information to be derived from a perusal of the indictment, as to the means used by him in committing the act or the manner in which it was done; for as to both his own knowledge is quite as reliable as any statements contained in the indictment. If he is not guilty, the information could not aid in the preparation of his defense. A disposition to relax much of this ancient strictness in criminal proceedings has manifested itself in modern practice, and in harmony therewith the legislature of this state has substituted, in the place of the old, a new system of practice and pleading, which retains all the elements of the former so far as they are made necessary by a due regard for the substantial rights of a defendant, but discards all such elements as serve no good purpose, and only tend to embarrass and defeat the administration of justice. That system provides a few plain and simple rules by which to determine the sufficiency of pleadings, and declares that such rules shall be the test: Sec. 235.

Those rules are found in section 246, and in order to ascertain whether an indictment is sufficient or not, it is only necessary to interrogate it by the light of that section. The present indictment stands this test in every particular: 1. It is entitled in a court having authority to receive it; 2. It was found by a grand jury of the county in which that court was held; 3. It gives the name of the defendant; 4. It shows that the crime alleged was committed within the jurisdiction of the court; 5. It declares that the offense was committed at a time prior to that at which the indictment was found; 6. It sets forth the act charged as the offense clearly and distinctly in ordinary and concise language, without repetition, and in such a manner that any person can know and understand therefrom what is intended; for it alleges that the defendant,—stating his name,—at a place named, and at a time mentioned, which was prior to the finding of the indictment, with malice aforethought assaulted one James Duffy, and did cut and stab the said James Duffy, giving him a mortal wound, of which he afterwards died on the same day, and therefore within a year and a day from the time when the mortal thrust was received, which is all that is necessary to constitute the offense of murder, and sufficiently identifies the act to guard the defendant against a second prosecution, and as provided in the seventh and last subdivision of the section in question, states the same with sufficient certainty to enable the court to pronounce a judgment. The indictment is not bad because it

does not allege that James Duffy was a human being, nor that he had a body, nor the part of his body upon which the wound was inflicted. The first two never were necessary, and the last is not now, whatever it may have been formerly. If there is any objection to the indictment, it is found in the fact that it designates the degree of the murder. While this does not make the indictment bad, and may be treated as surplusage, still the indictment ought not, because it need not, state the degree of the murder. The trial jury, and not the grand jury, determine the degree of the crime, and the former should not be embarrassed by the opinion of the latter.

The court did not err in disallowing the challenge interposed by the defendant to the juror Jesse Davis upon the ground of implied bias. In order to render a juror incompetent on the ground of implied bias, it must appear that he entertains a fixed and settled conviction of the guilt or innocence of the defendant, or that he has expressed such a conviction. Whatever falls short of this does not amount to an unqualified opinion within the meaning of the statute. Admitting that Davis had formed an opinion,—which, in view of all his answers taken together, is extremely doubtful,—it certainly was not an unqualified, but on the contrary a conditional or qualified, opinion. The law upon this branch of the case will be found very fully discussed by Mr. Justice Baldwin in *People v. Reynolds*, 16 Cal. 130; see also *People v. Williams*, 17 Id. 142, and *People v. Mahoney*, 18 Id. 180.

It is next claimed that the court erred in giving the following instruction:—

“In the case that is now being submitted to you there is no evidence on any points or matters given in proof which reduce the crime charged in the indictment to manslaughter; if the defendant be found guilty, therefore, you cannot consider the question of manslaughter upon the evidence in this case.”

This instruction is not a little obscure, and if it was given as represented in the transcript, it is quite possible that the jury may have found some difficulty in determining its exact meaning. The record does not contain the evidence, or any part thereof, and we cannot therefore read the instruction in the light of the testimony, in view of which it was given, but are forced to determine its meaning by its own terms. If there was any evidence before the jury tending, however slightly, to reduce the homicide to the grade of manslaughter, this instruction was erroneous. If the expression, “there is

no evidence on any points or matters given in proof," is to be understood as admitting that there were "points and matters given in proof," which, if true, would reduce the offense to manslaughter, but declaring the evidence as to such points or matters to be insufficient to warrant the jury in finding them to be true, it was erroneous, because it assumed to pass upon the weight of evidence, which, under our constitution, is left entirely to the jury, and in regard to which the judge, contrary to the rule of common law, is not allowed to express an opinion. On the other hand, if there was a total absence of all testimony as to such facts and circumstances as would, under the law, reduce the offense from murder to manslaughter, and the instruction is to be understood as declaring such to be the case, then it was not erroneous, because judges, although not allowed to charge juries with respect to matters of fact, may state the testimony and declare the law: Const., art. 6, sec. 17. At common law a judge is allowed to express his opinion as to the weight of evidence: *Commonwealth v. Child*, 10 Pick. 252. In this respect, the constitutional provision referred to was intended to change the rule so as to leave the weight of the evidence entirely to the jury; but judges may still, as formerly, state what facts are in evidence and what are not; or in other words, they may state the evidence *pro* and *con*, in view of which the existence of certain facts is affirmed or denied, which includes the right to state to the jury that there is no evidence as to particular facts or issues where such is the case. Counsel for defendant seems to have understood the judge as instructing the jury that there was no evidence as to facts which, under the law, would reduce the offense charged to manslaughter, and to have excepted to the instruction upon that ground; so understood,—there being no evidence of the character in question,—the instruction was not erroneous.

It is proper, however, to add in this connection that in the absence of any statement or bill of exceptions embodying the evidence, or declaring its purport or tendency, so far as may be necessary to point the exception, we must presume in favor of the action of the court below, upon the principle that the party who alleges error must show it. This, however, must be taken with the qualification that where the action of the court below is manifestly erroneous under any and every conceivable state of facts, this court will review it, notwithstanding the evidence may not have been brought up: *People v. Levison*, 16 Cal. 98 [76 Am. Dec. 505].

It appears from the instructions given by the judge of his own motion, that there was evidence before the jury tending to prove that the defendant was intoxicated at the time the homicide was committed. In view of this evidence, certain instructions were asked on the part of the defense, to the effect that, so far as the degree of murder is concerned, no presumption arises from the mere fact of the killing, considered apart from the means used, and the circumstances under which it occurred; and that, in determining the question of premeditation, it was proper for the jury to take into account the defendant's condition as drunk or sober. These instructions were evidently taken from the case of *People v. Belencia*, 21 Cal. 544, and ought therefore to have been given; unless already given in substance, for as to the law of that case there can be no question. Where the homicide is not committed by means of poison, lying in wait, or torture, or in the perpetration, or the attempt to perpetrate, arson, rape, robbery, or burglary, the degree of the offense depends entirely upon the question whether the killing was willful, deliberate, and premeditated; and upon that question it is proper for the jury to consider evidence of intoxication, if such there be, not upon the ground that drunkenness renders a criminal act less criminal, or can be received in extenuation or excuse, but upon the ground that the condition of the defendant's mind at the time the act was committed must be inquired after in order to justly determine the question as to whether his mind was capable of that deliberation or premeditation which, according as they are absent or present, determine the degree of the crime.

The court below does not seem to have questioned the law of the defendant's instructions, but refused to give them upon the ground that they had been already given in substance. Upon inspection of the instructions given by the court, we are satisfied that the law, as declared in the instructions under consideration, had already been given in language perhaps better adapted to the comprehension of the jury, and hence the ruling of the court was not erroneous. We add, however, that in such cases it is better to give the instructions asked than to refuse, for by such refusal a pretext is afforded for an appeal, which otherwise, perhaps, would not be taken.

The judgment is affirmed, and the court below directed to appoint a day for the execution.

INDICTMENT FOR MURDER NEED NOT STATE the weapon used: *Dukes v. State*, 71 Am. Dec. 370. And as to the description of the wound, or portion of the body upon which it was inflicted, see the above case, and note 390. An indictment charging that the killing was committed by some manner and means unknown is good: *State v. Williams*, 72 Id. 248; *Commonwealth v. Webster*, 52 Id. 711, note 738; *People v. Cronin*, 34 Cal. 200, where the principal case is cited. It is also cited and approved in the following cases, as to what constitutes a good indictment under the California criminal code, showing that the common-law form of indictment is abolished, and that it need only state such facts as the code requires: *People v. Dick*, 37 Id. 280; *People v. Shaber*, 32 Id. 38; *People v. Ah Woo*, 28 Id. 208; *People v. Cronin*, 34 Id. 200, 208, 210; *People v. Hong Au Duck*, 61 Id. 389; *State v. Millain*, 3 Nev. 465. The following cases declare specifically that the indictment need not describe the weapon used, the wound inflicted, or the other means employed to accomplish the killing: *People v. Cronin*, *supra*; *People v. Hong Au Duck*, *supra*.

INDICTMENT FOR MURDER need not state degree of the crime: *White v. Commonwealth*, 6 Am. Dec. 443.

PERSON WHO HAS FORMED OR EXPRESSED DECIDED OPINION as to the guilt of the accused is incompetent to serve as a juror: *Nelms v. State*, 53 Am. Dec. 94, and note 101; *Armistead v. Commonwealth*, 37 Id. 633, and note; *Maddox v. State*, 79 Id. 307.

OMISSION TO CHARGE AS TO MANSLAUGHTER on indictment for murder, where the evidence does not warrant it, is not error: *Teal v. State*, 68 Am. Dec. 482, and note 486.

EXPRESSION OF OPINION BY JUDGE to the jury upon the weight of evidence is error: *Wesley v. State*, 75 Am. Dec. 62; *Melvin v. Easley*, 62 Id. 171; *Beverly v. Burke*, 54 Id. 351; *Gwathkin v. Commonwealth*, 33 Id. 264. But see, *contra*, *Matthews v. Allen*, 77 Id. 430.

COURT MAY PRESENT ALL FACTS in his charge: *Horne v. State*, 81 Am. Dec. 499.

IT WILL BE ASSUMED THAT PROPER INSTRUCTIONS WERE GIVEN: *Sidensarker v. Sidensarker*, 83 Am. Dec. 527, and note 534; and unless objected to, and noted in bill of exceptions, will not be noticed on appeal: *Note to Mayer & Co. v. McLure*, 72 Id. 194; *Price v. State*, 72 Id. 195.

EVIDENCE OF INTOXICATION is admissible in cases of homicide to show the condition of defendant's mind: *Note to Whiteford v. Commonwealth*, 18 Am. Dec. 782. As to instructions under such evidence, see *Gwathkin v. Commonwealth*, 33 Id. 264. And as to what degree of intoxication will excuse crime, see *Keenan v. Commonwealth*, 84 Id. 414.

IT IS NOT ERROR TO REFUSE TO GIVE INSTRUCTIONS already given in substance: *Holbrook v. Utica etc. R. R. Co.*, 64 Am. Dec. 502, note 505; *McCown v. Schrimpf*, 73 Id. 221. While this is true, it is the better practice in criminal cases to not refuse to give the instruction, if there is no valid objection to it, although the same question may be stated twice: *People v. Lachnais*, 32 Cal. 436. And a refusal presents a pretext for an appeal, which might not otherwise be taken: *People v. Strong*, 30 Id. 155, both citing the principal case.

INSTRUCTIONS OF LOWER COURT will be presumed to be correct, and when objected to on appeal without any part of the testimony being shown in the record, pointing to the ground upon which objection is based, the judgment will not be reversed nor the verdict disturbed, unless it manifestly appears

that such instructions were erroneous under every conceivable state of facts: *People v. Dick*, 34 Cal. 665; *People v. Torres*, 38 Id. 143; *People v. Brotherton*, 47 Id. 404; *People v. Smith*, 57 Id. 131; *People v. Gilbert*, 60 Id. 112. When the instructions are manifestly erroneous, the court will not hesitate to review the case, although it may not have the evidence before it: *People v. Dick*, 32 Id. 215, all citing the principal case.

MALICE AFORETHOUGHT IS NECESSARY INGREDIENT to murder, and should be alleged in the indictment: *People v. Schrutt*, 63 Cal. 28, citing the principal case.

INSTRUCTION SHOULD NOT BE GIVEN unless there is some evidence before the jury from which it can be logically deduced: *People v. Best*, 39 Cal. 691, citing the principal case.

COURT CANNOT CHARGE JURY IN RESPECT TO FACTS, nor express an opinion as to the weight of evidence: *State v. McGinnis*, 5 Nev. 339; *Levinsky v. Canning*, 33 Cal. 305. While this is true, the rule was the opposite at common law: *People v. Taylor*, 36 Id. 266. But the court may state the evidence, and that there is no evidence of particular facts: *People v. Dick*, 34 Id. 665, all citing the principal case.

ON TRIAL OF INDICTMENT FOR MURDER, court need not charge as to murder in the second degree when there is no evidence to prove that the crime is of that grade. The instructions should be given with reference only to the facts proved before the jury: *People v. Byrnes*, 30 Cal. 208, citing the principal case.

CONDITION OF ACCUSED, CAUSED BY INTOXICATION, may be considered by the jury, to enable them to decide as to the question of intent or premeditation, although intoxication will not excuse crime: *People v. Harris*, 29 Cal. 683; *People v. Williams*, 43 Id. 352. But if it is shown that he was intoxicated, and was incapable of forming a criminal intent, he should be acquitted: *People v. Blake*, 65 Id. 278, all citing the principal case.

ON TRIAL FOR MURDER, JURY ARE EXCLUSIVE JUDGES of the facts and weight of evidence. But if there is no evidence before them which reduces the crime charged to manslaughter, the court may so inform them, and instruct them that they cannot consider the question of manslaughter: *State v. Garraud*, 5 Or. 220; *Smith v. People*, 1 Col. 144, both citing the principal case.

DELAND v. HIETT.

[27 CALIFORNIA, 611.]

PAYMENT OF PART OF AMOUNT DUE ON MONEY JUDGMENT, under a contract that it shall operate as satisfaction in full does not discharge the judgment. Such contract is *nudum pactum*.

THE opinion states the case.

Mitchell and Cadwalader, for the appellant.

Whitesides, for the respondent.

By Court, SHAFER, J. The question in this case is, whether a payment of a part of the amount due upon a money judg-

ment will discharge the judgment, the payment having been made under a dry agreement that it should operate as a satisfaction in full. It was held in *Cumber v. Wane*, 1 Strange, 426, the leading case upon the subject, that a liquidated indebtedness presently due could not be discharged by a payment of less than the whole sum; and in the case of *Fitch v. Sutton*, 5 East, 230, the doctrine is not only reasserted, but the reason of it is given,—such a contract is *nudum pactum*. The question has been adjudged probably in every state in the Union, and the rule has been uniformly affirmed, and on the ground stated. There is a diversity of cases that are sometimes spoken of as exceptions to the rule, but they are more properly not within its scope. A composition going solely upon the grounds stated is universally bad. Inasmuch as the discharge in this case was of record, it is possible that it might operate as an estoppel, were it not for the fact that the complaint itself goes behind the record and exposes the fact that the discharge was entered in pursuance of a *nudum pactum*. The cases bearing upon the main question are collected in 1 Smith's Lead. Cas. 147, where the present state of the law upon the point is fully and learnedly exhibited in the note on *Cumber v. Wane*, 1 Strange, 426.

The judgment is affirmed.

WHETHER PART PAYMENT OF JUDGMENT, under an agreement that it shall discharge the whole, has that effect, see *Freeman on Judgments*, sec. 463, citing in support of the principal case *Garvey v. Jarvis*, 54 Barb. 179; see also *Bird v. Smith*, 56 Am. Dec. 635.

RAMSDELL v. FULLER.

[28 CALIFORNIA, 37.]

PROPERTY PURCHASED DURING COVERTURE WITH WIFE'S SEPARATE FUNDS becomes her separate estate.

MORTGAGE BY GRANTEE OF HUSBAND, OF PROPERTY PURCHASED WITH WIFE'S SEPARATE FUNDS, and deeded to her during coverture, is a cloud upon her title, which a court of equity will relieve against.

PRESUMPTION IS THAT PROPERTY CONVEYED TO WIFE FOR MONEY CONSIDERATION is common property, but this presumption may be rebutted by showing that it was purchased with money belonging to her separate estate.

ONE PURCHASING FROM HUSBAND REAL ESTATE DEEDED TO WIFE for a money consideration during coverture does so at his peril. The record of the deed is notice that the land may be the wife's separate property, and is sufficient to put purchasers upon inquiry.

ACTION to foreclose mortgage. The opinion states the facts.

Walter Van Dyke, for the appellant.

A. and H. C. Campbell, for the respondents.

By Court, SAWYER, J. On the 13th of November, 1856, the premises described in the complaint, for a consideration expressed in the deed, of three thousand dollars, were conveyed by one George W. Brown to the defendant Jane E. Fuller, who was then the wife of Silas Fuller. The purchase-money was paid out of funds belonging to the separate estate of Mrs. Fuller. On the third day of November, 1859, Silas Fuller, at that time the husband of defendant Jane E. Fuller (but who was very soon afterward separated from her by a decree of divorce), executed a conveyance of said premises to L. L. Lawrence. Said Lawrence, on the 11th of August, 1860, conveyed to defendant Summers. These deeds were regularly acknowledged and recorded. Both Lawrence and Summers took their respective conveyances with actual knowledge of the fact that the consideration of the conveyance from Brown to defendant Jane E. Fuller was paid out of the separate estate of Mrs. Fuller. On the 15th of June, 1861, defendant Summers executed the mortgage in suit to one Alexander G. Ramsdell, to secure the note set out in the complaint, which note and mortgage were afterward assigned to plaintiff. There is nothing other than the record of the deed from Brown to Jane E. Fuller to show that plaintiff, or his assignor, the mortgagee in said mortgage, had notice at the time of the execution and assignment respectively of said mortgage, that Mrs. Fuller claimed the land, or that the purchase-money was paid to Brown out of her separate estate. Subsequent to the execution of the mortgage, the defendant Jane E. Fuller, in an action instituted for that purpose against defendant Summers, recovered the premises in question. Plaintiff brought this action to foreclose the said mortgage, making Mrs. Fuller a party defendant.

The defendant Jane E. Fuller in her answer set up her title as aforesaid, alleging plaintiff's mortgage to be a cloud upon it, and asking as affirmative relief that the said mortgage be declared null and void as against her, and that the same be set aside, and be removed as a cloud on her title to said premises. The facts having been found upon the trial as herein stated, a judgment was entered in accordance with the prayer of the answer of defendant Jane E.

Fuller; and from that portion of the judgment this appeal is taken.

Conceding Mrs. Fuller to have a valid title as against the plaintiff's mortgage, there can be no doubt that the mortgage is a cloud upon it, which will be removed, within the principle of the case of *Pizley v. Huggins*, 15 Cal. 130, and numerous other cases. Property purchased during coverture with funds which constitute a part of the separate estate of the wife will also be her separate estate. Such a transaction would only be changing the form of the property, which is already held as separate estate, without in any degree affecting its character as separate property.

In *Huston v. Curl*, 8 Tex. 242 [58 Am. Dec. 110], the court say: "It is the settled doctrine and law that property purchased during the marriage, whether the conveyance be made to the husband or wife separately, or to them jointly, is presumed to belong to the community. This presumption may be rebutted by clear and satisfactory proof that the purchase was made with the separate funds of either husband or wife,—in which case it remains the separate property of the party whose money was employed in the acquisition." See also *Meyer v. Kinzer*, 12 Cal. 252 [73 Am. Dec. 538].

The power to change the form of the investment, without impairing the right of the wife, is absolutely essential to the full beneficial enjoyment of her separate estate.

A presumption arises from a conveyance to a married woman upon a money consideration, that the property conveyed is common property. But this is only a presumption of law arising from the fact that a purchase has been made during coverture, and the real character of the transaction may be shown. It is much easier for the party purchasing land to show affirmatively that the funds used are separate property of the party purchasing than for others interested to show negatively that they were not. The evidence is peculiarly within the knowledge and control of such party. For these and other reasons, when the fact is required to be proved, the law throws the burden of identifying the funds as a part of the separate estate upon the party claiming the benefit of such estate.

In this case it was shown to the satisfaction of the court, that the premises in question were purchased with funds belonging to the separate estate of the wife. They became therefore, in fact, her separate property. The conveyance was, upon

its face, to the wife. The apparent record title was in her, and not in her husband, Silas Fuller. The deed is sufficient in law to convey a title to the wife, but whether it did in fact convey an estate in common, or a separate estate, manifestly depended upon a fact *de hors* the deed. Ostensibly the intent was to vest the title in the grantee named, Jane E. Fuller. It did not appear on the face of the deed that the grantee was a married woman, or that, being a married woman, the consideration was paid out of her separate estate. The deed, then, so far as shown on its face, might have conveyed a title absolute to a *feme sole*, a separate estate to a *feme covert*, or an estate in common to husband and wife. Upon the best view for plaintiff, the deed upon its face was equivocal. But it afforded to all persons seeking to acquire title under it a clew to the title, which they were bound to pursue, or suffer the consequences of their laches. The grantee is a woman. The presumption of law is that she is *sole*, and *prima facie* a conveyance from her would pass the title. But she may be married, and her deed may not pass the title. The fact as to whether she is married or single all parties dealing with the land must ascertain, or omit to do so at their peril. So, also, if a grantee of a conveyance for a money consideration is a married woman at the date of the conveyance, *prima facie* a conveyance by the husband in his own name of the land so conveyed to the wife will be presumed to pass the title; but in fact it may not, for the reason that the land may still be the separate property of the wife, which he has no power to convey. And in such cases, as in the case last mentioned, all parties claiming title through the husband to lands, the title to which never stood in his name, must ascertain, at their peril, whether he did in fact have the power to convey.

The record title in this case was notice to all the world that the land in dispute might be the separate property of Mrs. Fuller, and every party dealing with it did so at his peril. The plaintiff was, by the record, put upon inquiry as to the true condition of the title. The grantee upon the record was capable of taking the land, and was a different person from the one from whom the plaintiff derives his title. If the plaintiff did not avail himself of the means afforded by the record to ascertain the true state of the title, it is his own fault, and he cannot claim to be an innocent purchaser. He stands in no better position than he would had he taken his mortgage

from Fuller himself. We think the judgment fully supported by the pleadings and the facts found.

It is therefore affirmed.

PRESUMPTION IS THAT PROPERTY BELONGS TO COMMUNITY: *Meyer v. Kiser*, 73 Am. Dec. 538, and note, and the extended note to *Cooks v. Bremond*, 86 Id. 626; but this presumption may be rebutted: *Peck v. Vandenberg*, 30 Cal. 42, 55; *Peck v. Brummagin*, 31 Id. 448; *Higgins v. Higgins*, 46 Id. 263. Land purchased with the wife's separate funds is her separate property: *Kirkpatrick v. Buford*, 76 Am. Dec. 363, and note. A purchase in the name of the wife in the usual course of business is sufficient notice to put third persons on inquiry whether the property was separate property or not: *Peck v. Vandenberg*, 30 Cal. 60; *Vassault v. Austin*, 36 Id. 697, 699, 700; *Hassey v. Wilke*, 55 Id. 529, all citing the principal case.

EQUITABLE RELIEF MAY BE HAD AGAINST CONVEYANCES which, though ineffectual to pass title, will cast a cloud thereon: *Porter v. Pico*, 55 Cal. 176, citing the principal case.

STEVENSON v. SMITH.

[28 CALIFORNIA, 102.]

DAMAGES NOT NECESSARILY ACCRUING FROM THE ACT COMPLAINED OF ARE SPECIAL, and must be pleaded with particularity, and so as to show the facts out of which they arise, or they cannot be recovered.

IN ACTION AGAINST SHERIFF FOR WRONGFUL ATTACHMENT of mare, and for damages for its detention, a claim for damages because the animal has lost flesh, in consequence of having been kept upon short pasturage, and because she was detained during the breeding season, is a claim for special damages, which must be specially and specifically pleaded.

ERROR OF COURT IN REFUSING TO ALLOW PARTY COSTS cannot be reviewed on an appeal from an order denying a new trial.

ACTION for damages. The opinion states the facts.

George Cadwalader, for the appellant.

W. S. Long, for the respondents.

By Court, SAWYER, J. This is an action to recover a mare and colt seized by the defendant (sheriff of Tehama County) under an attachment, and damages for their detention. Plaintiff recovered the property. Plaintiff moved for a new trial, on the ground that certain special damages claimed to have been proved were not found for him. The motion was denied, and the plaintiff appeals from the order denying a new trial.

The appellant claims that the evidence shows that the animals were placed by defendants in fields where the pasturage was poor, and that, in consequence of this act, they lost flesh, and depreciated in value to the extent of five hundred dollars.

Also, that the mare was a valuable brood mare, taken to Tehama County for the purpose of being bred to a particular horse, and that by reason of the taking and detention by defendants the breeding season was lost, whereby a further damage was shown to have been sustained, to the amount of five hundred dollars, and that the court should upon the evidence have found these items of damage for plaintiff.

On examination of the pleadings, we find no averments in the complaint that would authorize the recovery of the items claimed. These damages are special, and the facts out of which they arise must be averred or they cannot be recovered.

Mr. Chitty says: "Damages are either general or special. General damages are such as the law implies, or presumes to have accrued from the wrong complained of. Special damages are such as really took place, and are not implied by law, and are either superadded to general damages arising from an act injurious in itself, as when some particular damage arises from the uttering of slanderous words actionable in themselves; or are such as arise from an act indifferent and not actionable in itself, but only injurious in its consequences," etc.: 1 Ch. Pl. 395.

Again: "It does not appear necessary to state the former description of the damages in the declaration, because presumptions of law are not in general to be pleaded or averred as facts, etc. . . . But when the law does not necessarily imply that the plaintiff sustained the damages by the act complained of, it is essential to the validity of the declaration that the resulting damage should be shown with particularity. . . . And whenever the damages sustained have not necessarily accrued from the act complained of, and consequently are not implied by law, then, in order to prevent surprise on the defendant, which might otherwise ensue at the trial, the plaintiff must in general state the particular damage which he has sustained, or he will not be permitted to give evidence of it. Thus, in an action of trespass and false imprisonment, where the plaintiff offered to give in evidence that during the imprisonment he was stinted in his allowance of food, he was not permitted to do so, because the fact was not, as it should have been, stated in the declaration; and in a similar action it was held that the plaintiff could not give evidence of his health being injured, unless specially stated. So in trespass 'for taking a horse,' nothing can be given in evidence which is not expressed in the declaration, and if money

was paid over in order to regain possession, such payment should be alleged as special damages": 1 Ch. Pl. 396.

The complaint in this case only alleges the ownership of the animal, the value, the wrongful taking and detention, the demand, and that plaintiff "has sustained damages by reason of such wrongful taking and detention of said chattels and property in the sum of one thousand dollars."

From these facts alone, the law does not imply either of the items of damages claimed to have been proved. The first item is not even consequential upon any of the facts alleged, but results from other acts of defendants while the animals were in his possession. And the second item of damages would not necessarily result from a mere taking and detention. These damages depend upon an extraordinary value of the animal for a particular purpose, and upon the special use to which she was capable of being applied. The facts out of which these items of special damages arise must be alleged in the complaint, or they cannot be recovered. They are not alleged, and are therefore not embraced within the issues to be tried. For this reason, if for no other, the plaintiff is not entitled to judgment for such items of damages. There was, then, no error in not finding for plaintiff on these points.

The only other point made by appellant is, that the court erred in not giving plaintiff costs. There is no doubt in our minds that the plaintiff was entitled to costs. But this error in no way affects the finding, and is not a ground for a new trial. The error cannot, therefore, be corrected on appeal from an order denying a new trial. The proper mode of reviewing and correcting this error is on appeal from the judgment, but no such appeal has been taken in this case.

Judgment affirmed.

SPECIAL DAMAGES MUST BE ALLEGED AND PARTICULARLY STATED: See the note to *Adams Exp. Co. v. Egbert*, 78 Am. Dec. 387, and cases cited; and see the principal case cited to this effect in *L. T. Co. v. S. & W. W. R. R. Co.*, 41 Cal. 565; *Gay v. Winter*, 34 Id. 162.

ERROR IN TAKING COSTS CAN BE REVIEWED only on appeal from the judgment: *Lasky v. Davis*, 23 Cal. 678; *Dooly v. Norton*, 41 Id. 441, 443, citing the principal case.

PEOPLE EX REL. POLHEMUS v. PRATT.

[28 CALIFORNIA, 186.]

MANDAMUS WILL NOT LIE TO REVIEW ACTION OF COURT which is judicial and discretionary in its nature, but the remedy, if an error has been committed, is by appeal.

MANDAMUS WILL NOT LIE TO COMPEL JUDGE TO ENTER JUDGMENT OF DISMISSAL upon plaintiff's motion, and at his costs, where the motion is resisted by defendant and denied by such judge; for in a case of this kind a judge acts judicially.

MANDAMUS. The opinion states the facts.

Delos Lake, for the relator.

J. P. Treadwell, in *pro. per.*, against the writ.

By Court, **SANDERSON, C. J.** This is an application for a *mandamus* to the judge of the twelfth judicial district, commanding him to enter a judgment of dismissal in an action pending in his court wherein the relator and another are plaintiffs, and James P. Treadwell and others are defendants.

It appears that the plaintiffs in that action, upon notice, moved the court to enter a judgment dismissing it at their costs, as provided in the first subdivision of section 148 of the civil practice act. This motion was contested by defendant Treadwell, upon the ground that he had made a counter-claim, and hence the plaintiffs could not dismiss against his consent; and in support of his opposition to the motion, Treadwell relied upon the pleadings, proceedings, and a stipulation made in the action between the parties thereto, and an affidavit made by himself. After hearing the argument of counsel, the court denied the motion, thereby sustaining the grounds of the objection to the motion interposed by the defendant.

We do not think a *mandamus* will lie in this case. The real and substantial question presented for the decision of the court by the motion to dismiss was, whether the defendant had set up a counter-claim against the plaintiffs upon which he was seeking affirmative relief. If he had not, the plaintiffs were undoubtedly entitled to the judgment which they asked, otherwise not. The solution of that question depended upon the judicial reading and construction of the defendant's answer, and the stipulation between the parties, and the effect of the latter upon the former. It was claimed on the part of the plaintiffs: 1. That the counter-claim made in the answer could not be legally made in the action; and 2. That the counter-claim had been withdrawn by the force and effect of

the stipulation. Both of these propositions were denied by the defendant, and in deciding them the judge acted judicially, not ministerially; and having decided them according to the best of his ability, a *mandamus* does not lie to compel him to reverse his decision and render a different one: *Chase v. Blackstone Canal Company*, 10 Pick. 244; *People ex rel. Doughty v. Judges of Dutchess County*, 20 Wend. 658. This writ lies to compel a subordinate judicial tribunal to proceed and exercise its functions when it has neglected or refused to do so; but when the act to be done is judicial or discretionary, the writ cannot direct what decision or judgment shall be rendered, nor can it be granted, after the inferior tribunal has acted, for the purpose of reviewing its decision: *People v. Sexton*, 24 Cal. 79. If the court has committed an error in denying the plaintiffs' motion, the same can be reviewed on appeal, which is a speedy and adequate remedy in the ordinary course of law within the meaning of the 468th section of the practice act. To review errors is not the office of the writ of *mandamus*.

The case of *People ex rel. Smith v. Judge of the Twelfth District*, 17 Cal. 548, was a much stronger case for the relator than this. There the legislature by a special act had directed the court to make an order changing the venue in a certain action then pending before it. The language of the act was clear, explicit, and mandatory, leaving nothing to the discretion of the court. The court nevertheless refused to make the order, and it was held that a *mandamus* would not lie.

Mandamus denied.

SHAFTER, J., being disqualified, did not participate in the decision of this case.

MANDAMUS DOES NOT LIE TO REVIEW ACTION OF COURT which is judicial and discretionary: See *Arberry v. Beavers*, 55 Am. Dec. 791.

FRANKLIN v. DORLAND.

[28 CALIFORNIA, 175.]

DEFENDANT IN EJECTMENT IS NOT ESTOPPED BY HIS DEED, as against plaintiff, who is an entire stranger thereto.

DEED OF DEFENDANT IN EJECTMENT WILL NOT OPERATE AS ESTOPPEL IN FAS upon him, as against the plaintiff, who is a stranger thereto, in regard to the description of the land stated therein, if it does not appear that such description was inserted with a view to influence the plaintiff in the conduct of his own affairs, or that he was influenced by it in fact.

IN FIXING BOUNDARIES, MONUMENTS MENTIONED IN DEED GOVERN COURSES AND DISTANCES.

RECITALS IN DEED TO WHICH DEFENDANT IS PARTY AND PLAINTIFF STRANGER are admissible in evidence as simple admissions only, made by the party by whom the deed was executed.

VERDICT IS SO FAR OPPOSED TO EVIDENCE AS TO JUSTIFY NEW TRIAL, where in a trial in an action of ejectment, upon a question of boundary, the testimony of five unimpeached witnesses stood opposed to the description contained in a deed to which one of the parties was a stranger, and the verdict found the fact as recited in the deed.

IF ONE WHO IS NOT OWNER OF LOT OF LAND, AFTER EXECUTING DEED OF it to another, is placed in possession of the lot by the real owner, he may avail himself of this possession as a defense in ejectment brought against him by his grantee.

GRANTOR OF LAND TAKING ADVERSE POSSESSION SUBSEQUENT TO HIS DEED, and holding continuous adverse possession for five years, may set up the statute of limitations as a defense in an action of ejectment brought against him by his grantee.

EJECTMENT. The opinion states the facts.

Edward Tompkins, for the appellant.

Edward F. Head, for the respondent.

By Court, **SHAFTER, J.** This action was brought to recover the pieces or parcels of lands in San Francisco described in the complaint, and referred to throughout the case as parcels 1, 2, and 3. The plaintiff had judgment for the first and third parcels, and the defendant for the second. The defendant appeals from the judgment in favor of the plaintiff for the first and third parcels, and from the order denying his motion for new trial. No appeal has been taken by the plaintiff from the judgment against him for the second parcel.

The answer denies the right of the plaintiff to the several lots,—sets up title in the defendant and adverse possession of the first parcel for more than thirteen years, and title in Samuel Crim and adverse possession of the third parcel for thirteen years, and that defendant is not and has not been in the possession thereof except as the tenant of said Samuel Crim.

The defendant quitclaimed the first parcel sued for to Groat June 12, 1854, who quitclaimed to Robles in 1856, who, on the 20th of March, 1863, conveyed to the plaintiff. The north line of the parcel was described in the plaintiff's deed to Groat as follows: "Commencing at a point on the west line of Dolores Street, in said city, where it is intersected by a post-and-rail fence designed for pickets, along which is planted a

row of cottonwood trees." The location of this row of trees was one of the governing questions of fact controverted by the parties at the trial. The defendant introduced five witnesses, all of whom placed the trees on the line claimed by him; and the one witness who located them in the first instance according to the views of the plaintiff, by whom he was called, after hearing the witnesses for the defense, went voluntarily upon the stand, and so corrected his first statement as to bring it into substantial agreement with the testimony given by them. All of these witnesses were acquainted with the locality; none of them were impeached, nor is there anything in the record reflecting in the slightest degree upon their trustworthiness. The only evidence relied upon in rebuttal was found in a mortgage executed by the defendant, Dorland, to one Debus, in August, 1856. The premises covered by the mortgage are described therein as follows: "Commencing at a point on the western line of Dolores Street, formed by the intersection of the southern line of lands owned by J. P. Coater with said Dolores Street; thence running southerly on said line of Dolores Street 250 feet to lands recently deeded by the party of the first part to R. V. Groat; thence at right angles," etc. It is conceded, if the northern line of the lot conveyed by the defendant to Groat in 1854—that is, the row of cottonwood trees—was in fact 250 feet south of the starting-point named in the mortgage, that the lot so conveyed to Groat in 1854 is the one described in the complaint.

It is insisted for the respondent that the defendant was estopped by the mortgage from saying that the northern line of the Groat lot was not in fact 250 feet to the south of the point where Dolores Street is intersected by Coater's south line. This position is not tenable. The plaintiff is an entire stranger to the mortgage and the mortgage right, and therefore there can be no estoppel by deed; and as it does not appear that the description was inserted in the mortgage with any view to influence the plaintiff in the conduct of his own affairs, and particularly as it does not appear that the plaintiff ever was influenced by it in fact, it is apparent that the elements of an estoppel *in pais* are lacking also. The description in the mortgage stands, then, as a simple admission. If it had been proved that the defendant, having his attention called to the point as a principal question, had deliberately stated that the north line of the Groat lot was, to his knowledge, 250 feet south of the Coater corner, the state-

ment would, in our judgment, have been entitled to much higher consideration than can be claimed for it as it stands in the mortgage. Nothing is more common than discrepancies between the monuments and the courses and distances set forth in deeds. In such cases the monuments govern; and for the reason that they are usually stated upon full knowledge and reflection, while as to courses and distances, they are most frequently arrived at by estimate or guess in all those cases where visible monuments are named. For these reasons, we consider that the admission contained in the mortgage to Debus does not detract materially from the weight of the testimony of the six witnesses referred to as to the location of the row of cottonwood trees named in the deed under which the plaintiff claims. We therefore hold that the finding of the court on that point is so far opposed to the evidence as to justify the awarding of a new trial.

As to lot No. 3, there was no conflict in the evidence on the question of title. The plaintiff claimed under title derived from the defendant through a chain of quitclaim deeds. There was no evidence that the defendant, from whom the title started, was himself the owner of the lot, or that he, or the plaintiff, or any intermediate party in the chain, was ever in possession before or at the time when the deed was given. The defendant, under proper allegations in his answer, introduced evidence tending to prove that he, after the execution of the deed under which the plaintiff claimed, was placed in the possession or custody of the lot as the agent of one Crim, who claimed to be, and as the evidence tended to prove was, in fact, the owner of the land. If Crim was the owner of the lot, and put the defendant in custody of it after the date of the defendant's quitclaim, there can be no just pretense that the defendant could not avail himself of that state of facts to protect himself in that custody (assuming now that his custody amounted to a personal possession on his part), even though he had, prior to his assuming such custody, quitclaimed the lot to Martel, under whom the plaintiff claimed directly. We consider the findings in relation to this lot as opposed to all the evidence having to do with the rights of the parties with respect to it.

It appears from the record that the "defendant offered to prove by legal and competent testimony that he had been in the open, notorious, and adverse possession of the Groat lot for more than five years next preceding the commencement.

of the action." The plaintiff objected to the evidence generally, and it was excluded by the court. The counsel for the respondent seeks to justify this ruling on the broad ground that a "grantor cannot set up the statute of limitations against his own deed." We consider that a grantee can, under circumstances, be disseised by his own grantor as well as by another. In the matter of an adverse possession taken by a grantor subsequent to his deed, and continuously held thereafter, the possession is not the possession of the grantee's "predecessor," as that term is used in the sixth section of the statute of limitations. The effect of that section is to allow a grantee to tack to his own the possession of his grantor preceding the grant, for the purpose of working out a bar against him who has the legal title.

The terms of the offer in this case were of the broadest, and if the maker of a quitclaim deed can, under any conceivable state of facts, hold the premises quitclaimed adversely to the party to whom the deed is given, then the ruling was erroneous. We hold such adverse possession to be possible in law, and that is the only point raised upon the record for review.

Judgment reversed, and a new trial ordered.

IN FIXING BOUNDARIES, MONUMENTS GOVERN COURSES AND DISTANCES: *Richardson v. Chickering*, 77 Am. Dec. 769, and note.

REBUTALS IN DEED AS EVIDENCE: See *Osborne v. Endicott*, 65 Am. Dec. 496, and note.

STRANGERS TO DEED ARE NOT PRECLUDED from showing the purpose for which it was executed: *Satterlee v. Bliss*, 36 Cal. 505; *Dorland v. Magilton*, 47 Id. 487, citing the principal case.

GRANTOR OF LAND MAY SUBSEQUENTLY ACQUIRE TITLE thereto by adverse possession: *Lord v. Sawyer*, 57 Cal. 67, citing the principal case.

McCOMB v. REED.

[28 CALIFORNIA, 281.]

ATTACHMENT, REGULAR UPON ITS FACE, IS NOT VOID because the complaint does not set up a cause of action which would warrant the issuance of an attachment.

IN ACTION AGAINST SHERIFF FOR VIOLATION OF DUTY IN SERVICE OF ATTACHMENT, if he relies on matters occurring after its issuance and operating to dissolve it, such matters must be specially pleaded.

WHERE DEFENSE MUST BE SPECIALLY PLEADED, OMISSION TO PLEAD IT is not cured by the introduction, without objection, of evidence in support of it, and the finding of the facts in relation to it by the court.

SHERIFF RECEIVING ATTACHMENT REGULAR ON ITS FACE cannot pay over the money obtained by him from the sale of property levied on by virtue of the writ to a junior attaching creditor, because the complaint in the action on which the first attachment was issued did not set forth a cause of action upon which an attachment could issue.

IT IS DUTY OF SHERIFF RECEIVING MONEY ON EXECUTION SALE of property, levied on by virtue of attachments, to apply the money in the order of the attachments. The sheriff has no right to go back of the process and raise the question as to the validity of the attachments.

WHETHER JUNIOR ATTACHING CREDITOR CAN SUCCESSFULLY ATTACK VALIDITY OF PRIOR ATTACHMENT on the same property, on the ground that the complaint did not contain a cause of action upon a contract, express or implied, for the direct payment of money, *quære*.

PARTY CANNOT RECOVER, AGAINST ANOTHER, JUDGMENT PAYABLE IN GOLD OR SILVER COIN, on the ground that the other received for him the sum sued for in that form, unless the kind of money received is specially averred in the complaint.

ACTION on sheriff's bond. The opinion states the facts.

Delos Lake and Robert F. Morrison, for the appellants.

James C. Cary, for the respondents.

By Court, **SHAFTER, J.** This is an action on a sheriff's bond, given by defendant Reed, sheriff of the county of Humboldt, and executed by the other defendants as his sureties.

The complaint alleges that the plaintiffs, in the year 1856, brought an action in the superior court of the city of San Francisco against Ross and McLean for three thousand dollars, then due and owing from the defendants to the plaintiffs; that having filed an affidavit, and given the necessary bonds, an attachment issued for the sum of \$1,632.08, directed to the sheriff of the county of Humboldt, which writ was thereafter delivered to Reed, as such sheriff, for service, and that he thereafter, and by virtue of the process, attached property of Ross and McLean more than sufficient to satisfy the attachment and the costs of serving the same; that the sheriff thereafter sold the property under the attachment, and that the proceeds were more than sufficient to satisfy the plaintiffs' claim and the sheriff's fees and charges; that the plaintiffs thereafter recovered judgment in said action for the sum of \$1,632.08, and \$50.50 costs, which judgment remains in full force and unsatisfied; that Reed thereafter, in derogation of the plaintiffs' rights, paid the money in his hands to junior attaching creditors of Ross and McLean, under pretense that the attachment of the plaintiffs was a nullity; that the plain-

tiffs thereafter sued out an execution on their judgment and delivered it to the sheriff, who returned it *nulla bona*. The complaint then proceeds to set forth the sheriff's bond, and to assign the breach on which the plaintiffs rely, viz., the misapplication of the funds, as before stated.

The answer contains a general denial of all the plaintiffs' allegations, and a special defense that "the cause and causes of action stated and set forth in the complaint in the superior court in the city of San Francisco, by the said plaintiffs, against Charles S. Ross and Hector H. McLean, was not and were not, as set forth in said complaint, upon contract or contracts, express or implied, for the direct payment of money; and that the attachment issued in said action was invalid, illegal, and void." There are two other special defenses stated in the answer, but no question is made upon either.

There were in fact two complaints filed in the action,—one original and the other amended; and it does not appear precisely whether the complaint referred to in the first special answer named is the original or the amended complaint; nor does it make any difference, in the view that we take of the case, whether the reference is to the one or the other.

The case was tried by the court. The findings are contained in the record, and the appeal is from the judgment entered thereon in favor of the plaintiffs.

1. The court has found that the attachment issued, in fact, upon the original complaint; and that the complaint was thereafter amended by the introduction of new counts, which, as is apparent, set up causes of action not within the purview of the original complaint; and it is insisted that these amendments operated as a dissolution of the attachment. It appears, also, that the fourth count was demurred to specially, and that the count was adjudged to be insufficient; and it is claimed that the attachment was thereby dissolved. But the demurrer and the decision upon it,—the fact of the amendments, the nature of them, and the fact that they were made subsequent to the attachment,—are all new matter. They are reconcilable with the truth of every averment in the complaint, and if they could have any operation it would be by way of avoidance. The question of their legal effect cannot be gone into on this appeal, for they were not specially pleaded. The circumstance that the facts have been found by the court, and upon evidence to the introduction of which it does not appear that the respondents objected, is of no avail. The case

must be determined upon the facts as related to the issues joined: *Smith v. Owens*, 21 Cal. 12.

2. The court has found the allegations of the complaint to be true; and under the issues taken on the first special answer, the finding is that the original complaint contained four counts: the first, for goods sold and delivered; the second, for money paid, laid out, and expended; the third, on an account stated; and the fourth, on a special contract made between the parties on the tenth day of April, 1856, whereby the plaintiffs agreed to purchase and consign groceries to the amount of two thousand dollars to Ross and McLean, for sale on joint account. The plaintiffs were to receive interest at the rate of one per cent per month, two and one half per cent commission for purchasing, and seven and one half per cent of the net profits. The defendants were to render an account quarterly. The goods, when shipped, "were to be regarded and held as consignment from said McComb & Co." It was further averred: "That in pursuance of said contract, they (the plaintiffs), from time to time, consigned to the defendants goods and merchandise to the value of three thousand five hundred dollars, at cost prices, for cash; which goods and merchandise were received by said defendants, under and in pursuance of said contract, to be held and accounted for by said defendants as consigned goods. And the plaintiffs aver that the said defendants have in no manner accounted to the plaintiffs for said merchandise, or the proceeds thereof, nor for any part of the same, but have converted and disposed thereof to their own use, and have wholly neglected and failed to render to the plaintiffs any account of sales of said goods, notwithstanding more than three months have elapsed since the said goods and merchandise were consigned to and received by said defendants as aforesaid. And the plaintiffs aver that although often requested, the defendants have not paid to the plaintiffs the several sums of money aforesaid, or any part thereof. Wherefore they pray judgment for three thousand dollars."

1. It is claimed for the appellants that the action, in so far as the fourth count is concerned, is not based "upon a contract expressed or implied, for the direct payment of money." The respondents controvert this proposition, but they insist, primarily, that neither the sheriff nor his sureties can raise the question; and we think the point well taken.

Conceding for the purposes of argument that the fourth count sounds in damages, still the attachment was not void.

The writ was regular on its face, and therefore was good as a protection to the officer. The attachment would have held, as between the parties to the action, in the event of a failure on the part of the defendants to raise the objection. It was held, in *Bacon v. Cropsey*, 3 N. Y. 195, that where, under the provisions of a statute, an execution might issue thirty days after the entry of a judgment, "the fact that it was issued within a shorter period was not a defense to a sheriff in an action against him for false return"; and "that an execution so issued was not void, but voidable." The court, in the case at bar, had jurisdiction of the action, and therefore had jurisdiction over the question of the attachment: *Crust v. Phillips*, 7 Abb. Pr. 209. And it appears, further, that the validity of the attachment was in fact passed upon by the court, on a motion to dissolve made by the parties defendant, and that the motion was overruled. This decision, if objectionable at all, was erroneous at the worst, and not *coram non judice*. No appeal was taken from the judgment subsequently rendered, and the interlocutory order is now *res judicata* as between the parties to the record. It follows that if no attachment but the plaintiffs' had been put upon the property, and the defendant had failed to pay over the proceeds on execution, the objection now urged to the validity of the attachment would not have availed the sheriff as a defense. This conclusion is further sustained by *Jones v. Cook*, 1 Cow. 309; *Ross v. Luther*, 4 Id. 158 [15 Am. Dec. 341]; *Dominick v. Eacker*, 3 Barb. 17. *Buffandeau v. Edmondson*, 17 Cal. 441 [79 Am. Dec. 139], was trespass against a sheriff for five thousand dollars damages, for proceeding to sell the plaintiff's property under execution after service of an injunction restraining such sale. The defense went upon the ground, in part, that the plaintiff had no right to an injunction; that is, upon the ground that the court erred in granting the injunction. The court say: "It is unnecessary to consider whether the bill of complaint showed a proper case for an injunction, or whether the injunction was regularly granted or not. It was enough for the sheriff that a court of competent jurisdiction had made the order, and then it became his duty to obey it. It is no part of the sheriff's duty to sit in judgment upon official acts and reform the errors or revise the orders of a judge." *McGovern v. Payn*, 32 Barb. 84, cited for the appellants, is not in point. There the order of arrest was examined on the motion of the defendant made by him in the action.

The subsequent attachment of Fleishman varied neither the rights nor the duties of the sheriff, as above stated. He was but a ministerial officer before the second attachment was made, and the making of it did not vary the extent nor the quality of his powers. The plaintiff's attachment and execution were all final documents as to the sheriff. He had no right when he received Fleishman's attachment to go back of that process and raise the question of its validity upon the pleadings in the action in which it was issued, nor was he at liberty to concern himself with that question when he received Fleishman's execution. The rule of official duty in the matter of the plaintiff's process was the same. When the sheriff received the respective executions, it was his duty to apply the money in the order of the attachments as required by law. Had he done so, his ministerial duties would have been fulfilled, and he would have been protected against all attacks that might have been made upon him at the suit of Fleishman. If Fleishman had the better right, it was his business to move in the matter in person, and in one of the alternative modes pointed out in *Speyer v. Ihmels*, 21 Cal. 287. Or if the execution creditors were respectively pushing the sheriff at law, and he did not care to solve the question of his own duty, he might under proper proceedings have obtained judicial direction. But as a sheriff can under no circumstances go back of an execution and disobey its expressed mandate on the ground that the judgment upon which it issued was erroneous in fact or in his opinion, so he cannot under any circumstances go back of a writ of attachment valid on its face and adjudge the question of the party's right to it upon the pleadings, and certainly not in a case where the precise point has been raised and determined by the court in advance: *Crocker on Sheriffs*, sec. 844; *Dixey v. Pollock*, 8 Cal. 573.

Further, it may well be doubted whether Fleishman could have established a better right in himself to the funds in the sheriff's hands by force of the alleged error if he had moved directly in the matter: *Patrick v. Montader*, 13 Cal. 434; *Fridenberg v. Pierson*, 18 Id. 152 [79 Am. Dec. 162]; *Drake on Attachments*, c. 39. But that is a question which it is not necessary for us to decide.

The judgment, in so far as it provides for a recovery in United States coin, is erroneous. The complaint does not make a case within the specific-contract act. The allegation is, that "the said Reed, sheriff as aforesaid, sold the said property and

converted the same into cash, and received as the proceeds of such sale more money than was sufficient to satisfy the plaintiffs' said demand, and all the lawful fees and charges of the said Reed in that behalf." The right to the relief given is peculiar and exceptional, and if a party would recover money in the form of gold or silver of one who received it for him in that form, the form or kind of money received should be specially averred: Stats. 1863, p. 687. There are other grounds on which the validity of the judgment in this particular may be questioned, but inasmuch as it is not necessary to pass upon them, we forbear to discuss them.

The court below is directed to modify the judgment by striking out that portion of it which requires that the sum recovered should be paid in gold or silver coin of the United States; the judgment as so modified to stand as the judgment in the case.

IRREGULARITIES AND DEFECTS IN ATTACHMENTS, and right of third parties to question validity of attachment in collateral proceedings: See the extended note to *Friedenberg v. Pierson*, 79 Am. Dec. 166.

DUTY OF SHERIFF CONCERNING ATTACHED PROPERTY: See *Hartlieb v. McLane*, 84 Am. Dec. 464, and note.

LANE v. GLUCKAUF.

[28 CALIFORNIA, 288.]

CONTRACT AGREEING TO PAY SPECIFIC SUM IN GOLD COIN, or upon failure thereof to pay such further sum as may be equal to the difference in value between gold coin and legal-tender notes, belongs to the class of contracts provided for in the so-called specific-contract act of California, and may be enforced according to its meaning; and the meaning of such contract is that the maker will pay in gold coin, or if he does not do so, in legal-tender notes at their gold value, and a judgment may be rendered on such contract payable in gold coin alone.

CALIFORNIA SPECIFIC-CONTRACT ACT WAS NOT INTENDED TO LEGALIZE CONTRACTS which without it were illegal, but to provide a remedy for enforcing certain contracts, if held to be legal.

IF ACTION ON PROMISSORY NOTE, IF TRIAL IS HAD, the court may render judgment for the amount of the note and interest, and make the judgment bear the same rate of interest as the contract, although the complaint only prays for judgment for the face of the note.

IF NOTE IS MADE PAYABLE IN ALTERNATIVE, EITHER IN GOLD OR LEGAL-TENDER NOTES, a judgment rendered on it may also be in the alternative.

ACTION by an assignee thereof upon the following written contract, to wit:—

"\$2,843.

OROVILLE, August 4, 1863.

"Six months after date, without grace, for value received, I promise to pay to the order of George C. Perkins the sum of \$2,843 in gold coin of the standard value of 1860 of the United States of America, with interest at one and a half per cent per month till paid. And if said principal and interest is not paid in gold coin, as above stated, then, for value received, I promise to pay to the order of said G. Perkins, in addition thereto, and as damages, such further amount and percentage as may be equal to the difference in value in the San Francisco market between such gold coin and paper evidence of indebtedness of the states or of the United States, that are or may hereafter be made a legal tender in payment of debts by the laws of this state or the United States. JOSEPH GLUCKAUF."

The remaining facts appear in the opinion.

Joseph E. N. Lewis, for the appellant.

George Cadwalader, for the respondent.

By Court, SANDEBSON, C. J. All the points made by counsel for appellant relating to the constitutionality of the so-called specific-contract act of 1863 we pass without further notice. So far as this court is concerned, that question has been put at rest (*Carpentier v. Atherton*, 25 Cal. 564), and contracts made under that act must be held valid.

But it is claimed that the contract in this case is not within the meaning of that act, and in support of that proposition the case of *Lamping v. Hyatt*, 27 Cal. 99, is cited. That case, however, does not sustain the proposition. We there held that the contract sued on was not a gold contract, and did not, therefore, support the judgment, which required satisfaction in gold. There is an obvious difference between the terms of the contract in that case and the contract in this.

The specific-contract act (so called) did not propose to make contracts legal which otherwise were illegal, but to extend to certain contracts assumed to be legal the equitable remedy of specific performance. It was matter of doubt whether, assuming those contracts to be legal, and not repugnant to the legislation of Congress upon the subject of legal tender, the courts had the power to enforce their performance in such a manner as to secure all the benefits intended thereby, or in other words, whether the courts would or could, without the aid of legislation, extend to such contracts the remedy of specific

performance. To remove that doubt, and for no other purpose, the act in question was passed. If the courts should determine that contracts of the character contemplated by the act were illegal and void on account of some repugnancy to all or either of the laws of Congress providing what shall be legal tender in payment of debts, the act would have no office to perform and become harmless because inoperative. If, on the contrary, such contracts should be held valid, a remedy in case of their non-performance, about which there could be no controversy, would be provided, and any inconvenience which might result on account of any real or supposed uncertainty as to the remedy would be obviated. Such was the object of the act in question, and it had no other purpose. It was not intended to operate in hostility to any of the laws of Congress, but to secure on the part of all citizens an honest observance of the terms of their contracts, and to prevent them, so far as it could be lawfully done, from availing themselves of a legal measure of public necessity to work a moral and private wrong.

The contract in suit, in our judgment, belongs to the class mentioned in the act in question. Counsel do not agree as to its meaning. We shall first assume for the purposes of this opinion the one adopted by counsel for the appellant. It is then an alternative contract, and provides for payment in either of two kinds of money, at the election of defendant, both of which are therein specified. The precise amount to be paid, if paid in one kind, is fixed; if paid in the other kind, the mode by which the amount is to be ascertained is clearly defined, and by that mode can be readily determined with certainty. Such being the case, the judgment by the terms of the act in question ought ordinarily to follow the contract and fix the amount to be paid if paid in gold, and the amount to be paid if paid in legal-tender notes. The defendant could then have paid it off in either kind of money. If he did not pay voluntarily the execution would have followed the judgment, and alternatively directed the sheriff to collect in either kind of money. At the sale the defendant could have directed the sheriff to sell for gold or legal-tender notes, at his option. If he did not so direct, the plaintiff or the sheriff could have elected. So there is no good reason why this contract may not be held to be within the act even when construed as contended for by counsel for the appellant.

But there is another interpretation of this contract which

was adopted by the court below, and which we think is the right construction. To interpret a contract is to ascertain the true intent of the contracting parties, and when that has been done it is the duty of the court (unless the intent be an illegal one) to carry it out, and to render that form of judgment which will be most effectual for that purpose.

No one can read the contract in question without the conviction that it was made to take on its peculiar form solely for the purpose of affording security and protection to the payee, and not to secure to the maker a privilege or an advantage. It is manifest that it was the first intention of the payee to secure a payment in gold if such payment could be lawfully enforced; and secondly, if that could not be done, payment in legal-tender notes at their value in the San Francisco market when converted into gold. It was not the intention of the parties to the contract to give the maker the benefit of an alternative, but to compel payment in gold, which is especially evident from the fact that the alternative claimed to have been stipulated for could not possibly, if the contract should be performed in that way, secure any advantage or benefit to him, for in either way he agrees to pay the same value, and the court in decreeing specific performance by exacting payment in gold has not gone beyond nor stopped short of the intention of the parties.

It is next claimed that the relief granted exceeds that prayed for in the complaint. This point is based upon the fact that the complaint does not ask for accruing interest, and that the judgment be made to draw interest at the same rate as the contract, whereas the court allowed accruing interest, and framed the judgment so as to make it draw the same rate of interest as the contract. In support of this point, *Lamping v. Hyatt*, 27 Cal. 99, is cited. But that was a case of default. Where judgment is by default, the court cannot grant greater relief than is demanded in the complaint; but where there is a trial, the court may grant any relief consistent with the case made in the complaint and embraced within the issue: Practice Act, sec. 147. The contract is set out in the complaint, and accruing interest and interest on the judgment are embraced within the issue, notwithstanding they are not included in the prayer.

Judgment affirmed.

SAWYER, J. (concurring specially). I concur on the second ground stated in the opinion.

CURREY, J. (concurring specially). I concur in the judgment.

WHEN AND TO WHAT EXTENT COURTS WILL RECOGNIZE DIFFERENT KINDS OF MONEY, BOTH BEING LEGAL TENDER. — This question arose mainly out of the enactment of the legal-tender act. The United States constitution, art. 1, sec. 10, provided that no state shall "make anything but gold and silver coin a legal tender for the payment of debts." The Congress of the United States, in 1862 and 1863, enacted what are known as the legal-tender acts, which provided in substance that United States treasury notes should be a legal tender for the payment of debts between private persons. These acts were severely criticised at the time, and serious doubts cast upon their constitutionality by the decisions of the various courts; but the supreme court of the United States finally determined that the acts were constitutional, and that it was merely the states, and not the federal government, that were prohibited from declaring other mediums than gold and silver to be a legal tender for the payment of debts between private parties; and the acts were held to affect payments of contracts entered into before the date of the acts as well as those entered into thereafter: *Legal Tender Cases*, 12 Wall. 457 (1871); *Booley v. Smith*, 13 Id. 604; *Bigler v. Waller*, 14 Id. 297; *Railroad Co. v. Johnson*, 15 Id. 196; *Latham v. United States*, 1 Ct. of Cl. 149. And in other courts, see *Verges v. Giboney*, 38 Mo. 458; *George v. Concord*, 45 N. H. 434; *People v. Cook*, 44 Cal. 638; *Murray v. Harrison*, 47 Barb. 484; *Murray v. Gale*, 52 Id. 427; S. C., 5 Abb. Pr., N. S., 236; *Metropolitan Bank v. Van Dyke*, 27 N. Y. 400; *Black v. Lusk*, 69 Ill. 70; *Knox v. Lee*, 12 Wall. 457; *Parker v. Davis*, 12 Id. 457; see also *Carpenter v. Northfield Bank*, 39 Vt. 46; *O'Neil v. McKean*, 1 S. C. 147; *Johnson v. Ivey*, 4 Cold. 608; *Shollenberger v. Brinton*, 52 Pa. St. 9.

The acts of Congress making the notes of the United States a legal tender do not apply to involuntary contributions in the nature of taxes or assessments exacted under state laws, but only to debts in the strict sense of the term; that is, to obligations founded on contracts, express or implied, for the payment of money: *Lane Co. v. Oregon*, 7 Wall. 71; *Hagar v. Reclamation Dist. No. 198*, 111 U. S. 701.

In the *Legal Tender Cases*, 110 U. S. 421, it was held that Congress has the constitutional power to make the treasury notes of the United States a legal tender in payment of private debts in time of peace as well as in time of war.

That state courts ought to follow the latest decisions of the supreme court of the United States, upon the validity of the legal-tender acts of Congress, see *Smith v. Smith*, 1 Thomp. & C. 63; *Townsend v. Jennischer*, 45 Miss. 200.

For a long time United States treasury notes had been depreciated in value, and the effect of the decisions upholding the legal-tender acts was that persons of whom money was due lost large sums in being compelled to accept the notes in place of gold or silver as payment. To avoid this effect, business men adopted the expedient of making their contracts payable in gold or silver, or some other specific medium, and it is on the specific enforcement of such payments that most of the decisions have been based.

The question has been discussed in several leading articles in legal periodicals, — among them 8 Am. Law Reg., N. S., 193; 10 Id. 73; 2 Am. Law Rev. 403; 4 West. Jur. 381; and the latest and best considered of them is found in 12 Am. Law Reg., N. S., 601.

Some of the states, among them California, Nevada, and Oregon, to aid the expedient adopted, passed what were known as "specific-contract laws," which provided that when contracts were made payable in a specific kind of money, judgments should be entered for the amount due in the kind of money specified in the contract. In Nevada, such a statute was held unconstitutional and in conflict with the acts of Congress: *Milliken v. Sloat*, 1 Nev. 573; *Mitchell v. Bromberger*, 1 Id. 604; *Fox v. Barstow*, 1 Id. 612; and *Sigismund v. Trotanovich*, 1 Id. 612; but in subsequent decisions (*Linu v. Minor*, 4 Id. 462, and *Wells, Fargo, & Co. v. Van Sickle*, 6 Id. 45), its constitutionality and validity were recognized; and in the cases in California, it has uniformly been held constitutional, and not opposed to the said acts: *Carpenter v. Atherton*, 25 Cal. 569; *Otis v. Hameltine*, 27 Id. 82; *Lamping v. Hyatt*, 27 Id. 102; *Higgins v. B. R. & A. W. & M. Co.*, 27 Id. 162; *Reed v. Eldridge*, 27 Id. 347; *Wallace v. Eldridge*, 27 Id. 498; *Wallace v. Del Valle*, 28 Id. 170; *Harding v. Cowing*, 28 Id. 212; *Spencer v. Prindle*, 28 Id. 276; *McComb v. Reed*, 28 Id. 281; S. C., ante, p. 115; *Reese v. Stearns*, 29 Id. 273; *Meyer v. Kohn*, 29 Id. 278; *Fox v. Minor*, 32 Id. 130; *Burnett v. Stevens*, 33 Id. 469.

In none of the other states, it is believed, do such statutes exist. And in the last case from Nevada (*Wells, Fargo, & Co. v. Van Sickle*, 6 Nev. 50), it is held that no necessity for such a statute exists, for the reason that if a court can enforce a contract for the payment of a specific kind of money at all, in view of the act of Congress, it has power, in the absence of statute, to render a judgment for such kind of money in a suit on the contract.

It is not on the basis of a difference in the values of money that the courts will enforce a contract or render a judgment for a specific kind, for the law will not recognize any difference in value between one kind of money which is a legal tender and any other kind which is also a legal tender: *Wells, Fargo, & Co. v. Van Sickle*, 6 Nev. 45; *Beatty v. Rhodes*, 3 Id. 240; *Reese v. Stearns*, 29 Cal. 273; *Fox v. Minor*, 32 Id. 130; *Burnett v. Stearns*, 33 Id. 469; *Bank v. Burton*, 27 Ind. 426. But it is on the ground that the parties have specifically contracted (just as they might have contracted for payment in any other commodity) for payment in a specific thing, — the kind of coin of other legal money named: *Wells, Fargo, & Co. v. Van Sickle*, 6 Nev. 46.

The earlier cases hold that a contract to pay in "gold coin" amounted to nothing more than a contract to pay the nominal value in any money which was a legal tender: *Appel v. Waltman*, 38 Mo. 194; *Riley v. Sharp*, 1 Bush, 348; as in treasury notes: *Laughlin v. Harvey*, 52 Pa. St. 9; *Graham v. Marshall*, 52 Id. 9. Thus a contract provided that a note and the interest thereon "should be paid in the current gold coin of the United States, in full tale or count, without regard to any legal tender that may be established or declared by any law of Congress." Held, that a tender in United States legal-tender treasury notes was sufficient: *Appel v. Waltman*, 38 Mo. 194. In *Riley v. Sharp*, *supra* (before the legal-tender act), it was said that as gold and silver coin alone constitute a lawful tender, in the payment of debts contracted to be paid in money a note payable in gold is regarded as payable in money simply; and damages cannot be recovered for a failure to pay the debt in gold on account of its enhanced value over money which is a legal tender. So under a contract stipulating for the payment of a specified sum of money in gold, or if paid in paper the amount thereof necessary to purchase the gold at the place of payment, it was held that the promisor, in case of his failure to pay the sum in gold, could not be compelled to pay a greater sum in legal-tender notes: *Brown v. Welch*, 26 Ind. 116. Again, it was held that a certificate of deposit of gold payable in like funds is satisfied by the tender of the

nominal value of such sum in legal-tender notes: *Sandford v. Hays*, 52 Pa. St. 93; that a covenant to pay a ground-rent in lawful silver money of the United States, each dollar weighing seventeen pennyweights and six grains, at least, "is satisfied by a tender of the nominal value in legal-tender notes": *Merrins v. Sailor*, 52 Pa. St. 9; S. C., 5 Phila. 422.

But in later cases the courts have uniformly held that where there is a specific contract to pay in a particular kind of coin, the contract may be specifically enforced for that particular kind of coin by a judgment therefor, and execution thereon: *Freeman on Judgments*, sec. 3; and *Bronson v. Rodes*, 7 Wall. 229; *Chesapeake v. Swain*, 29 Md. 483, 506; *Paddock v. Comm. Insurance Co.*, 104 Mass. 521; *Cheang Kee v. United States*, 3 Wall. 320; *Butler v. Horowitz*, 7 Id. 258; *Ind. Ins. Co. v. Thomas*, 104 Mass. 192; *Kellogg v. Sweetney*, 46 N. Y. 291; *Hittson v. Davenport*, 4 Col. 169; *Dewing v. Sears*, 11 Wall. 379; *Trebilcock v. Wilson*, 12 Id. 687; *Whitaker v. Dyer*, 56 Ga. 380.

Thus in *Bank v. Van Fleck*, 49 Barb. 508, it said that when a person promises for any valid consideration to return gold or silver instead of the national currency, he is bound to return those specific things, precisely as he would be bound to return a specific quantity and quality of any other commodity, if he had promised to do so for a valid consideration. So where there is a specific contract to pay a certain number of dollars "in American gold coin," or "in gold," a tender of legal-tender notes of a nominally equal amount with the gold agreed to be paid is insufficient if the notes are not par with gold: *Myers v. Kaufmann*, 37 Ga. 600. And it is held that a bond executed for the payment of a certain sum in gold and silver coin, lawful money of the United States, with interest also in coin, is not discharged by a tender of the amount and interest in United States legal-tender notes: *Bronson v. Rodes*, 7 Wall. 229.

But a covenant to pay a sum in "lawful money" is satisfied by the tender of the nominal value of such sum in legal-tender notes: *Davis v. Burton*, 52 Pa. St. 9; *Bronson v. Rodes*, *supra*. So an agreement to pay in "specie" has been held as a contract to pay in gold or silver coin: *Webb v. Moon*, 4 T. B. Mon. 483. A contract for payment in gold coin is not discharged by payment in a medium of less value than gold: *Vaughan v. Telegraph*, 14 Wall. 258.

Where, however, the contract was for "gold or its equivalent," it was held that the contract was one for a payment in any kind of money which is legal tender: *Reese v. Stearns*, 29 Cal. 273; *Wells, Fargo, & Co. v. Van Sickle*, 6 Nev. 46; and so where the contract was for "specie or its equivalent": *Jones v. Smith*, 48 Barb. 552; the reason being that the contract indicated that its object was not a payment of a named thing, — that is, a specific quantity of coin, — but was for the payment of a sum of money, and the law not recognizing the discrepancy between the value of different kinds of legal tender, it would consider in a case of this kind that a payment of the nominal amount in legal-tender notes was a full payment in the equivalent of gold: *Atkinson v. Lanier*, 69 Ga. 460. In Nevada, in *Wells, Fargo, & Co. v. Van Sickle*, *supra*, it was said that a contract of this latter kind, to be construed as specific, must specify a time and place for determination of what is the equivalent of gold; otherwise a payment in lawful money would be sufficient.

In *Hilton v. Davenport*, 4 Col. 169, it is held that a payment of a gold contract in currency will discharge the contract to the extent of the actual value of currency.

NO GREATER RELIEF CAN BE ALLOWED THAN THAT PRAYED FOR in the complaint, where the judgment is by default; but after a trial on the merits,

the relief is not limited to that so prayed, and interest, though not asked for, may be allowed: *Gautier v. English*, 29 Cal. 168; *Rhomb v. Clinton*, 2 Utah, 237; *Corcoran v. Doll*, 32 Cal. 88; *Cassack v. Phoenix Ins. Co.*, 28 Id. 631; *N. C. & S. C. Co. v. Kidd*, 37 Id. 324, all citing the principal case.

FERREA v. KNIPE.

[28 CALIFORNIA, 240.]

RIPARIAN PROPRIETOR TO WHOM WATER FIRST COMES HAS NO RIGHT TO ERECT DAMS across the stream and spread out the water, so that it is lost by absorption and evaporation to an extent that prevents it from flowing to another riparian proprietor, as it would have done but for the dams.

IT IS NOT REASONABLE USE OF WATER FOR RIPARIAN PROPRIETOR, who desires to use the same for watering cattle and for domestic purposes, to erect dams across the stream, by which the water is spread out and lost by evaporation and absorption so as to injure another riparian proprietor below.

ACTION for abatement of nuisances, and for damages. The opinion states the facts.

William S. Wells, for the appellant.

M. A. Wheaton, for the respondent.

By Court, CURREY, J. In 1863, as appears by the finding, the defendant erected a dam across the creek above the plaintiff's dam, by which the natural flow of the stream was obstructed. In April, 1864, he erected two other dams across the same creek above the plaintiff's dam, by means of which several dams the water of the stream was entirely obstructed and prevented from flowing to the dam of the plaintiff, whereby the plaintiff was wholly deprived of the waters of the stream, and his vegetables and fruit growing at the time of the erection and continuance of these dams were injured, to his damage in the sum of two hundred dollars. It further appears by the finding that the object of the defendant in erecting his dams was only to detain sufficient water for his stock, and that he used the same for no other purpose, and that when the action was brought there was not water enough in the creek to flow to the plaintiff's reservoir if no dams had been erected above it.

The evidence in the case shows that the last-named year was one of extreme drought, and that at the time this action was commenced the water of the creek was so reduced in quantity at the place where the defendant had erected his

dams (which were more than a mile from the plaintiff's land) as to be insufficient to flow over such dams. Every proprietor of lands through or adjoining which a watercourse passes has a right to a reasonable use of the water, but he has no right to so appropriate it as to unnecessarily diminish the quantity in its natural flow. The use of the water of a stream for domestic purposes and for watering cattle necessarily diminishes the volume of the stream. This is unavoidable, and though by reason of such diminution a proprietor on the stream below fails to receive a supply commensurate with his wants, he is without remedy, because his right subsists subject to the rightful use of the water by his neighbor on the stream above him. But while admitting that a riparian owner to whom the water first comes in its flow has the right to use it for domestic purposes, and for watering his cattle, it is proper to observe that he has not the right to so obstruct the stream as to prevent the running of water substantially as in a state of nature it was accustomed to run. The maxim of the law which he is bound to respect while availing himself of his right is, *Sic utere tuo ut alienum non lædas*: 3 Kent's Com. 440; Angell on Watercourses, sec. 195; *Tyler v. Wilkinson*, 4 Mason, 440.

The court found that by reason of the dams erected by the defendant "the flow of the stream was wholly obstructed, and the waters detained were prevented from flowing to the dam of the plaintiff, and that he was thereby deprived of the use of the same prior to the commencement of this suit," and "that the plaintiff has sustained damages by reason of said acts of defendant in the sum of two hundred dollars." The court also found that the defendant was insolvent, and unable to respond to any judgment that might be recovered against him. The court further found that the defendant erected the dams "only to gather sufficient water for watering his stock, and used it for no other purpose," and "that at the time this suit was commenced there was not water enough to flow to the plaintiff's pond had no dams been built."

The fact that the water was so reduced in quantity at the time the action was commenced as to be insufficient to flow to the plaintiff's premises, had the same been unobstructed, was not a circumstance decisive of the case. If before then the creek was wholly obstructed by the defendant, and the water of the stream was prevented by him from flowing to the plaintiff's land, by reason whereof he was deprived of the use of the water, and thus suffered damages, he had just cause of

complaint, and was entitled to relief and to the remedy which he sought to prevent the continuance of the injury. Though the defendant had the right to use the stream for watering his cattle and for household purposes, he had not the right under the circumstances to dam up the creek and spread out the water over a large surface, by which it would become lost by absorption and evaporation to an extent to prevent the stream from flowing to the plaintiff's premises as it would have done had it not been for the defendant's dams. It cannot be held in this case that the obstruction and diversion of the water of the creek was necessary to the proper and beneficial use of the stream by the defendant, and that as a consequence the injury sustained by the plaintiff was *damnum absque injuria*. The facts found by the court preclude such a conclusion. From the facts found the plaintiff was entitled to judgment, on the ground that he had the right to the water of the creek in the natural flow, subject only to the use thereof by the defendant in a reasonable manner, without unnecessary obstruction or diminution: Angell on Watercourses, c. 4, and the authorities therein cited.

The judgment must be and is hereby reversed, and the cause remanded to the court below, with directions to enter judgment for plaintiff.

Neither SANDERSON, C. J., nor SAWYER, J., expressed any opinion.

RIGHTS OF RIPARIAN PROPRIETORS TO EXCLUSIVE USE OF WATER IN STREAM: See *Rhodes v. Whitehead*, 84 Am. Dec. 631, and note.

TYLER v. GREEN.

[28 CALIFORNIA, 406.]

IN POSSESSORY ACTION FOR PUBLIC LANDS, where the plaintiff claims to recover by reason of prior possession, and the defendant claims as a pre-emptor under the laws of the United States, the latter is entitled to prove the necessary facts to establish his pre-emption right.

DEFENDANT WHO HAS NOT BEEN CALLED UPON TO STATE WHETHER HE EXPECTED TO PROVE all the facts essential to his defense should not be prevented from testifying because his offer does not embrace every fact necessary to establish it.

JUDGMENT WILL NOT BE REVERSED FOR ERROR that could not affect the rights of the parties.

ACTION for recovery of possession of certain real property. It appears that one Abel having been in possession of a certain

tract of public land, as a pre-emptor, one Stewart recovered judgment against him, and sold the land under execution to plaintiff, Tyler, who received a sheriff's deed. Subsequently, Abel left the land, when one Green went into possession, claiming as a pre-emptor. Tyler then brought this action on his deed, to recover possession. On the day before the trial, the sheriff amended his return by inserting a more particular description of the land levied on. The defendant objected to the admission of the amended return in evidence, which objection the court overruled. Judgment went for plaintiff, and defendant appealed.

J. H. Budd, for the appellant. *

Tyler and Cobb, for the respondent.

By Court, SAWYER, J. This case differs from *Page v. Hobbs*, 27 Cal. 483. In that case the declarations of intention filed in the land-office were not admissible, because they were made for the purpose of acquiring a pre-emption right to lands which at the time were not subject to pre-emption. They were of no validity, and therefore irrelevant. In this case, the defendant sets up in his answer that the lands in question are public lands of the United States, subject to pre-emption, and alleges that he is in possession, claiming a pre-emption right; also averring the necessary facts to constitute that relation. On the trial, he offered to prove by competent witnesses several of the facts averred, and necessary to establish his pre-emption right. The plaintiff objected, on the ground that the evidence was "improper and irrelevant." The objection was sustained, and the testimony excluded. The evidence was certainly relevant to the issues raised by the pleadings, and necessary to sustain the defense of lawful possession giving a pre-emption right. It is now contended, however, by respondent, that the evidence was inadmissible, because the offer did not embrace every fact necessary to establish the defense. It was relevant as far as it went. The defendant may not have been able to prove all the facts by the witnesses then under examination. It may be that he intended to prove other facts by other witnesses, who did not know the facts now offered. It does not appear that he was called upon to state whether he intended to follow the testimony offered by other testimony or not. As this essential evidence was excluded, it would have been useless to offer testimony as to the other facts necessary to sustain this defense, because without the testi-

mony offered and excluded he must necessarily have failed on that defense. It does not appear that the evidence was excluded because the defendant did not propose to prove the other facts essential to his defense. If this was the point of the objection, it should have been so stated. The objection was general that it was improper and irrelevant. The act of Congress of 1862 (12 Stats. at Large, 410, sec. 7) extended the right of pre-emption to unsurveyed lands in California. We think the exclusion of the testimony was error.

If there was error in allowing the sheriff to amend his return to the execution, it in no way affected the defendant, for he claimed no title under the defendant in the execution. No rights were acquired under the defendant in the execution, between the times of making and amending the return.

Judgment reversed, and new trial ordered.

RIGHTS OF PRE-EMPTORS ON PUBLIC LANDS.—The purpose of this note is not to discuss the law of pre-emption or the right to pre-empt, but merely to show what rights are acquired by a pre-emption upon public lands. See generally the note upon this topic to *Henry v. Welch*, 21 Am. Dec. 492.

A concise synopsis of the pre-emption law was prepared by the United States Public Land Commission, in 1880, to which there have been no material changes. It is as follows:—

“The privilege of pre-emption now extends to settlement on unsurveyed as well as on surveyed lands, and a credit of from twelve to thirty-three months is given the pre-emptor by residence thereon.

“By act of application at a district land-office, and the payment of a fee for the registration of his claim, a person gains the right to occupy thereunder a certain tract of land, offered or unoffered, now not more than 160 nor less than 40 acres (in the first act the quantity was 640 acres), for a limited period, with obligation at the end of that period to pay to the United States \$1.25 per acre for the land in the tract claimed or entered, and receive a patent therefor.

“Any person seeking the benefits of pre-emption under the laws now in force must be the head of family, a widow, or a single man over twenty years of age, a citizen of the United States, or must have filed a declaration of intention to become such, and that he is not the owner of 320 acres of land within the United States, and must be a person who has not quit or abandoned his or her own land in the same state or territory to reside upon the public lands.

“Actual settlement upon the tract claimed, for the exclusive use and benefit of the pre-emptor, and not for purposes of sale or speculation, must be shown, under the rules and regulations of the department, to the satisfaction of the register and receiver. Upon these simple requisites entry may be made to the extent of one quarter-section or other compact body, not exceeding 160 acres (unless the quarter-section subdivision exceeds this amount by a fractional number of acres) upon any of the public lands of the United States to which the Indian title has been extinguished, not reserved, nor included within the limits of any incorporated town, or selected for town site

purposes, or actually settled and occupied for trade and business, or lands which contain any known salines or minerals, except in the states of Alabama, Mississippi, Louisiana, Arkansas, and Florida, in which, by special act of Congress, of June 2, 1866, the public lands are brought exclusively under the provisions of the homestead act, and by act of July 4, 1876, are subject to private entry, after first being offered."

Title Acquired by Pre-emptors. — It is held that pre-emption will carry no title against the government. Thus in the *Yosemite Valley Case*, 15 Wall. 77, it is said that a person by mere settlement upon lands of the United States, with a declared intention to obtain title to such land under the pre-emption laws, does not thereby acquire such a vested interest in the premises as to deprive Congress of the power to grant it to another person. See also the note to *Henry v. Welch*, 21 Am. Dec. 493. In 10 Op. Att.-Gen. 56, it is held that the right of pre-emption granted to settlers on the public lands is not a vested interest in the land, but only a contingent right to purchase the land before any other person, whenever it shall be brought into general market; and that the government may, at any time before proof and payment by the settler, reserve the land from sale. And to the same effect is *Busch v. Donohue*, 31 Mich. 482.

But while this is so, it is held that, as against pre-emptors who have complied with the conditions of the law, the executive department has no right to convey to others; and whenever it does so the grants are void: 5 Op. Att.-Gen. 7; *Friebie v. Whitney*, 9 Wall. 187; *Aiken v. Ferry*, 6 Saw. 79.

Where a party has settled upon public land with a view to acquire a right of pre-emption, the land being open to settlement, his right thus initiated is not prejudiced by the refusal of the local land-officers to receive his proofs of settlement, upon an erroneous opinion that the land is reserved from sale: *Shepley v. Cowan*, 91 U. S. 330.

The true interest acquired by qualified pre-emptors amounts to a right to purchase the lands they occupy or enter upon at the minimum price (subject to the right of Congress to withdraw the lands), to the exclusion of all other persons: *Clements v. Warner*, 24 How. 394; *Friebie v. Whitney*, 9 Wall. 187; *Brown v. Throckmorton*, 11 Ill. 529; *Camp v. Smith*, 2 Minn. 156; *Coleman v. Allen*, 75 Mo. 332; 8 C., 5 Mo. App. 127; and if a pre-emptor neglects to pay for the same, he forfeits his right: *Craig v. Tappin*, 2 Sand. Ch. 78; *Grand Gulf R. R. Co. v. Bryan*, 8 Smedes & M. 234.

A pre-emption right claimed under the act of Congress, if steps are shown to have been taken to secure the same, is a good defense to an action of trespass: *United States v. Brown*, 4 McLean, 378.

The rules of adverse possession do not apply to a case where one party enters upon public land after it has been abandoned by a prior possessor: *Gluckauf v. Reed*, 22 Cal. 468. A claimant of land under pre-emption laws, as against a prior possessor, must show that he belongs to that class of persons who are entitled to avail themselves of the provisions of those laws: *Page v. Hobbs*, 27 Id. 483. If a party has obtained a pre-emption certificate, but it proves to be void, because the statute has not been complied with, it is proper for any one else to enter upon the land for pre-emption, as if the former occupier had done nothing about a certificate: *Rodgers v. Vass*, 6 Iowa, 405.

Courts of equity will enforce pre-emption rights where all the requirements of the law have been complied with: *Garland v. Winn*, 20 How. 7; *Hughes v. United States*, 4 Wall. 233.

Conveyance of Interest by Pre-emptor. — Unless forbidden by some positive law, contracts made by actual settlers on the public lands concerning their

possessory rights, and concerning the title to be acquired in future from the United States, are valid as between the parties to the contract: *Lamb v. Dawenport*, 18 Wall. 307.

By the act of Congress, it is provided that the patent shall issue to the pre-emptor alone, and that all assignments and transfers of the right of pre-emption given by this act prior to the issuance of the patent shall be null and void. This, it is held, applies only to that right which belongs to the pre-emptor before he has paid the purchase-money, and the certificate has been issued to him by the register: *Dillingham v. Fisher*, 5 Wis. 475; and a sale of this right is null and void: *Arbour v. Nettles*, 12 La. Ann. 217; *Penn v. Ott*, 12 Id. 233; *Stanbrough v. Wilson*, 13 Id. 494; *Wilkinson v. Mayfield*, 27 Miss. 542; *Craig v. Tappin*, 2 Sand. Ch. 78; *Glenn v. Thistle*, 23 Miss. 42.

But the effect of contracts by the pre-emptor on the title which he acquires by the patent is regulated by the state laws and state courts, and they will enforce these contracts as contracts to sell: *Camp v. Smith*, 2 Minn. 155; *Wilson v. McLernan*, 20 Iowa, 30; *Cyndiff v. Orms*, 7 Port. 58; *Lamb v. Dawenport*, 18 Wall. 307; affirming 1 Saw. 609. The right to assign according to the state laws is complete in the pre-emptor from the time of his purchase and entry, and though the patent issues to him, it inures to the benefit of his grantee: *Camp v. Smith*, 2 Minn. 155. In *Phelps v. Kellogg*, 15 Ill. 131, it was held that if a party covenants in a deed, that if he shall acquire a title at any time thereafter, such title shall inure to the benefit of the grantee in the deed, such covenant is binding on all persons deriving title through the grantor with notice of the deed.

A contract by an administrator, before entry in the land-office, to transfer pre-emption rights to third persons advancing the entry-money, when by law the patent should issue to the heirs, is void, and none the less so because the probate court is induced to sanction it: *Cochran v. McCoy*, 33 Ala. 65. So a contract with an occupant to purchase the land of him, and that he shall remain on the land to perfect his title as a pre-emptor, is illegal and void. And if the maker of a note, given for the purchase-money in such case, suffers judgment to go by default, he cannot be relieved from the judgment on the ground that after its rendition the occupant failed, through his negligence, to perfect his title as pre-emptor: *Brown v. Pointdexter*, 10 Smedes & M. 596. An agreement with another, that if he will not oppose the claim, the pre-emptor will, on acquiring his patent, convey one half of the land to him, is void: *Snow v. Kimmer*, 52 Cal. 624.

Incidental Rights — Right to Cut Timber. — A pre-emptor on public land has a right to cut timber on the land for the purposes of agriculture or erection of improvements upon the land: *United States v. Nelson*, 5 Saw. 68; *United States v. Lane*, 19 Fed. Rep. 910; *United States v. Yoder*, 18 Id. 372; and he may even sell such of it as he may have cut and not used; but he must not cut to sell: *Timber Cases*, 2 McCrary, 519.

The right of pre-emption given by the acts of Congress is a mere gratuity on the part of the United States for the benefit of the purchaser, his heirs and assigns; and his creditor has no legal or equitable claim to such gratuity: *Rodgers v. Rawlings*, 8 Port. 326.

CARPENTIER v. MENDENHALL.

[28 CALIFORNIA, 484.]

OUSTER IS NOT FOUND EITHER IN TERMS OR BY LEGAL CONCLUSIONS, by a special verdict, in an action of ejectment brought by a tenant in common against a co-tenant who is in the occupancy of the land held in common, that the plaintiff demanded of his co-tenant to be let into the immediate possession of the same, and that the co-tenant refused.

FACT OF OUSTER OR INTENT TO OUST CO-TENANT MUST BE FOUND BY JURY, for the law will not presume from acts of ownership by one tenant in common, nor from his refusal to allow a co-tenant to enter, nor from both combined, that there was intent to oust.

IF TENANT IN COMMON DEMAND OF HIS CO-TENANT, who is in the occupancy of the common property, to be let into possession, and the co-tenant refuses, and does not give any explanation of his refusal, the court would be justified in directing or advising the jury to infer an ouster.

IF ONE UNLAWFULLY TAKING POSSESSION OF LAND AFTERWARDS BECOMES TENANT IN COMMON in the ownership of the same, the moment he becomes such tenant in common his possession loses its hostile character, and the presumption is that it remains amicable until the contrary is made to appear.

IN EJECTMENT BY TENANT IN COMMON, AGAINST CO-TENANT who took possession wrongfully, but afterwards became a co-tenant, plaintiff cannot recover damages for the period during which the defendant was unlawfully in possession.

TENANT IN COMMON CANNOT, IN EJECTMENT AGAINST HIS CO-TENANT, recover damages or mesne profits for the period during which the possession of the co-tenant was not adverse.

TENANT IN COMMON WHO IS OUSTED BY CO-TENANT may recover damages in ejectment from the time of the ouster, according to his right.

EJECTMENT. The opinion states the facts.

E. R. Carpentier, for the appellant.

Thomas A. Brown and John Reynolds, for the respondents.

By Court, SHAFTER, J. This is an action of ejectment. The trial was by jury, who returned a special verdict upon issues submitted to them by the court. Judgment was entered upon the findings in favor of the defendants. The plaintiff appealed, and at the July term, 1864, the judgment was reversed by this court, and a new trial ordered, on the authority of *Carpentier v. Webster*, 27 Cal. 524. The appellant moves that the order be vacated, and for judgment in his favor upon the special verdict.

The jury have found: 1. That the plaintiff, on and prior to the first day of September, 1858, was, and that he still is, the owner in fee of the equal undivided half of the rancho of San Ramon, embracing the premises described in the complaint,

and of a further undivided interest equal to three hundred and twenty acres; 2. That all the defendants, with the exception of Stout, Slankard, and White, entered into possession on the day before named; that Stout took possession July 14, 1862, White on the 14th of May, 1860, and Slankard on the 3d of January, 1863,—the day when the complaint was filed; that all the defendants have continued in possession since the date of their respective entries; 3. That none of the defendants had any title to the demanded premises prior to the 9th of March, 1860, nor any right to the possession of the same, nor any part thereof; but that on that day they, with the exception of Stout, White, and Slankard, became tenants in common with the plaintiff; that Stout became such tenant July 14, 1862, White May 14, 1860, and Slankard January 3, 1863; 4. That the plaintiff, prior to the commencement of the action, and between the 15th and 20th of December, 1862, served upon each of the defendants, personally, the following written demand:—

“SAN RAMON, December 20, 1862.

“SIR: You will please take notice that the lands and premises now occupied by you are part and parcel of the Rancho San Ramon, of which I am the principal owner, and that I demand to be let into the immediate possession and enjoyment of the same, and every part and parcel thereof.

“Respectfully yours,

“H. W. CARPENTIER.”

5. The rental proof of each of the parcels occupied by the respective defendants.

Two questions have been discussed by counsel: 1. Is the plaintiff entitled to judgment on the special verdict? and if so, then, 2. For what amount by way of damages?

The second question it will be unnecessary for us to consider, for we are satisfied that the special verdict does not lay an adequate foundation for a judgment in the plaintiff's favor on the main question involved.

The trouble with the verdict is that it does not find an ouster either in terms or by legal conclusion. A demand is found, and a refusal matching the demand; but “demand and refusal” does not fall within any definition of “ouster,” as that term is used in the law governing the relation of tenants in common. Neither acts of ownership by one tenant in common, nor refusal to allow co-tenants to enter, necessarily work a disseisin. The law will not presume from either the one or the other, nor from both combined, that there was an

intent to oust. That intent must be established as a fact by the finding of the jury. Conversion is one of the points to be established in actions of trover; but it is settled that "demand and refusal" is not conversion, but only evidence of it for the consideration of the jury. In the absence of all explanation the court would be justified in directing or advising the jury to infer a conversion, or an ouster in a case like the one at bar, from the fact of demand and refusal; but the inference is to be made by the jury, and not by the court: 2 Stark. Ev. 683; *Prescott v. Nevers*, 4 Mason, 330; *Cummings v. Wyman*, 10 Mass. 468; *Carpentier v. Webster*, 27 Cal. 524.

But it is insisted that the verdict finds an ouster of the plaintiff by all the defendants, except Stout, White, and Slankard, prior to the demand and refusal, and independent of it, to wit, their unlawful entry upon the premises in September, 1858,—a year and a half before the rights of the defendants as tenants in common were acquired.

It is said in support of this position that the possession acquired in 1858 was by disseisin, and it is added "that the possession never lost its hostile character"; and it is upon this assumption of fact that the whole argument turns. But the verdict demonstrates that the possession unlawfully taken in 1858 did lose its hostile character, *prima facie*, on the 9th of March, 1860, when, as the verdict finds, they become tenants in common with the plaintiff. The moment the defendants became tenants in common with the plaintiff, their possession lost its hostile character by the legal effect of the fact; and it cannot be presumed that the possession was otherwise than amicable thereafter, until the contrary is made to appear.

It is further claimed that an ouster is manifested on the face of the answers; and here we are referred to *Harrison v. Taylor*, 33 Mo. 211 [82 Am. Dec. 159]. The doctrine of that case is that when a defendant, sued in ejectment by a tenant in common, states in his answer that "he holds the premises adversely against all persons," the action will not fall on the ground that there was no demand made previous to the action. The case at bar is not within the rule. The answers here contain no averment or admission of adverse possession on the part of any of the defendants, but deny the ouster alleged in terms.

Though we have declined to pass upon the question of the amount of damages to which the plaintiff is entitled, for the reason that on this record it does not appear that he is enti-

tled to any, still, as the case must go back for a new trial, under the order already made, we deem it proper to state the principles by which the question of damages must be controlled.

As to damages which accrued prior to March 9, 1860, traceable to the ouster of 1858, they cannot be recovered in this action. For the reasons already stated, that ouster has become unavailable as a basis of recovery in chief, and it is therefore unavailable in this action as a ground for the recovery of damages resulting from it. A party may recover specific real property, "with damages or without them": Practice Act, sec. 64; but when he sues to recover such property with damages, he cannot recover damages if he fails to recover the property. The practice act states an exception to this rule, but the case at bar is not within it: *Id.*, sec. 256.

As to damages during the interval between the 9th of March, 1860, when the defendants, or most of them, became tenants in common with the plaintiff, and the demand and refusal of December, 1863, neither damages nor rents and profits can be recovered in this suit, for in legal judgment the possession of the defendants during that time was not adversary, but amicable, and in strict keeping with the title.

As to damages that have accrued since the demand and refusal, if it shall turn out as matter of fact that the refusal was not supported by some legal right to refuse,—having, in fact, no other or better basis than the assumption that the plaintiff had no right of entry on the premises,—then the plaintiff will be entitled to recover damages according to his right, and the plea of the statute of limitations will not bar the claim.

Motion for judgment on the verdict denied.

RHODES, J., expressed no opinion.

oustER OF TENANT BY CO-TENANT, WHAT CONSTITUTES: See *Warfield v. Lindell*, 77 Am. Dec. 614, and note. Ouster is a question for the jury: *Workman v. Guthrie*, 72 Id. 654; and they should find, not facts from which ouster would be inferred, but the fact of ouster itself: *Packard v. Johnson*, 57 Cal. 183, citing the principal case.

RANDOLPH v. HARRIS.

[28 CALIFORNIA, 561.]

IN ACTION UPON LOST NOTE, TENDER OF INDEMNITY BEFORE SUIT is not absolutely necessary, but the better practice is to make such tender and allege the same in the complaint. A failure to do so is not fatal to the cause of action; it only affects the question of costs, and in other respects a tender at the trial is sufficient.

IN ACTION UPON LOST NOTE, IF NO TENDER OF INDEMNITY HAS BEEN MADE BEFORE SUIT, the plaintiff is not entitled to costs unless the defendant has waived a tender, in which case the costs are in the discretion of the court.

ON QUESTION OF INDEMNITY, NO DISTINCTION CAN BE MADE between a note which has been destroyed by fire or otherwise, and one which has been merely lost.

DENIAL THAT ASSIGNMENT WAS IN WRITING, OR FOR VALUABLE CONSIDERATION, does not amount to a denial of the fact of an assignment alleged in the complaint, but if it denies anything, merely amounts to a denial that the assignment was written or for a valuable consideration.

ACTION upon a promissory note. The opinion states the facts.

H. H. Hartley, for the appellant.

Coffroth and Spaulding, for the respondent.

By Court, SANDERSON, C. J. This is an action upon a lost promissory note, by an assignee against the maker; or, as averred in the complaint, a note which had been "totally destroyed by fire." There is no averment in the complaint to the effect that the plaintiff had tendered to the defendant a good and sufficient bond of indemnity before bringing the action. The only averment upon that subject is in the following words: "Plaintiff avers that he has offered, and now offers, to indemnify defendant against any loss or damage he may sustain on account of the destruction of said note." The action was commenced on the twenty-seventh day of June, 1864. On the 13th of August following, the plaintiff filed a bond of indemnity with the clerk of the court, and at the trial tendered the same to the defendant, who refused to accept it because it was insufficiently stamped, and because it had not been tendered before suit. No objection was made to the form of the bond or the sufficiency of the security. The court held that the plaintiff was not bound to tender indemnity before suit, but that the bond was insufficiently stamped, and permitted the plaintiff to add the requisite amount of stamps. In this connection the record contains the following: "The plaintiff also testified that he offered an indemnity bond be-

fore the suit was commenced, and that the defendant made some remark that amounted to a waiver of such bond." The case was tried by the court, but no findings were filed. Judgment was for the plaintiff for the amount claimed, but is silent upon the subject of indemnity.

It is first insisted that the complaint is fatally defective in not averring that a proper indemnifying bond had been prepared and tendered before the commencement of the action.

It was held in *Welton v. Adams*, 4 Cal. 37 [60 Am. Dec. 579], and reaffirmed in *Price v. Dunlap*, 5 Id. 483, that where it appears that a negotiable security has been lost or destroyed, the maker has a right to require indemnity against all future claims under it before its payment can be enforced. In the former case, as in this, the security had been destroyed by fire, but it was held that there was no distinction to be made between a lost instrument and one proved to have been destroyed. We are satisfied with the doctrine of that case, but we do not understand that it goes to the length of holding that the bond must be prepared and tendered in advance of suit. The complaint in that case did not aver the tender of a bond, nor, as in the present case, contain an offer to give one; but on the contrary, sought to excuse the plaintiffs from giving a bond on the ground of their inability to do so. The court held that they must give one before the defendants could be compelled to pay, and the judgment of the court was that "the judgment (which was for the plaintiffs) be reversed, and the cause remanded." No direction was given to the court below to dismiss the action on the ground that the complaint contained no cause of action, which would doubtless have been done had the court been of that opinion. We therefore regard the case as merely establishing the rule that the law will not enforce the payment of a lost note or bill without first requiring the holder to indemnify the maker if he demands it, and that, contrary to some American authorities, there is no difference in this respect between a merely lost bill and one which the evidence shows has been destroyed.

The only question, then, which we are called upon to determine is, whether it is absolutely necessary for the plaintiff to tender a bond before he brings his action.

With the question as to which forum, whether a court of law or equity, can afford relief in a case like the present, we have nothing to do, for under our system the two are blended, except so far as that question may be collaterally involved in

the one before us. In England a suit at common law cannot be maintained in such a case, but resort must be had to a court of chancery, which always decrees indemnity: *Hansard v. Robinson*, 7 Barn. & C. 90; upon the ground that upon the payment of a note or bill the maker or acceptor is entitled by the law merchant to its possession as a voucher of its payment, or if that cannot be had, to an equivalent in the shape of reasonable indemnity against all future claims upon him. The English doctrine was in effect, as we understand it, adopted in *Welton v. Adams*, 4 Cal. 37 [60 Am. Dec. 579]. Treating the case, then, as one of equitable cognizance, we think the failure to tender indemnity before suit is not fatal to a recovery, and only affects the question of costs.

The tender of indemnity cannot be considered as any part of the plaintiff's cause of action or as a fact or event upon which his right of action accrues. It is merely a condition which the law imposes upon his right to enforce his cause of action, the performance of which is exacted as a substitute for the delivery of the note or bill, which otherwise he is bound to make upon payment. But it is inequitable to subject the defendant to costs when he may be willing to pay upon reasonable indemnity and before he is placed in the wrong by a tender and refusal. Hence, if the plaintiff desires to recover costs, he must make the tender before suit, or show a waiver of indemnity on the part of the defendant. On the other hand, all that the defendant can rightfully ask is that he be not required by the court to pay the money or subjected to costs until reasonable indemnity has been furnished.

The proper course to pursue in such cases is for the plaintiff to prepare and tender, before suit, reasonable indemnity. If it be refused he can then sue, alleging the tender and refusal, and keep the tender good by filing the bond in court. If, at the trial, the court shall be of the opinion that the indemnity is reasonable and sufficient, he will be entitled to judgment, with costs. But he may sue and offer in his complaint to give such indemnity as the court may adjudge reasonable, and upon complying with the order of the court in that respect, take his judgment, but without costs. This last course was adopted in *Tersey v. Gary*, commented on by Lord Chancellor Hardwicke in *Walmsley v. Childs*, 1 Ves. Sr. 345, and sustained. The same principle was recognized in *Gray v. Dougherty*, 25 Cal. 282. In cases like the present, the costs are regulated by the 498th section of the practice act, and are left to the dis-

cretion of the court, to be awarded or apportioned according to the equity of the case.

In this case, as before stated, there is no averment of a previous tender, and but for the fact that such tender seems to have been waived by the defendant, we should be compelled to reverse the judgment so far as the allowance of costs is concerned. We think, however, that the allowance of costs was correct in view of that fact.

The exceptions taken to the admission of the written assignment of the note by the original payee to the plaintiff are answered by the fact that the assignment was not in issue, and no proof of it was therefore required. The attempted denial of the assignment in the answer is in these words: "And this defendant further answering, on information and belief, denies that said Daniel Richards, for a valuable consideration, assigned, by a written instrument, the indebtedness due upon said note, or that the said assignment was stamped with United States revenue stamps of the required amount and denomination, or that any written assignment was made." This is not a denial of the assignment. If it can be considered as a denial at all, it can only be considered as a denial that the assignment was in writing, and that it was made for a valuable consideration. Such a denial was held bad in *Burke v. Table Mountain Water Co.*, 12 Cal. 407, and *Morrill v. Morrill*, 26 Id. 292. The pleadings being verified, and the assignment not specifically denied, it must be taken as admitted for all the purposes of the trial.

Judgment affirmed.

TENDER OF INDEMNITY AS PREREQUISITE TO ACTION ON LOST NOTE: See *Welton v. Adams*, 60 Am. Dec. 579, and *Moore v. Fall*, 66 Id. 297.

BURT v. WILSON.

[26 CALIFORNIA, 682.]

NO EXPRESS OR IMPLIED TRUST IS CREATED BY TRANSACTION, whereby one of two partners, who are embarrassed with debts, executes a deed to the other, absolute on its face, with a consideration expressed, of both his individual property and interest in the partnership property, for the purpose of enabling the grantee to raise money by mortgaging the same to pay the firm debts.

MISTAKE OF GRANTOR AS TO LEGAL EFFECT OF LANGUAGE USED IN DEED, if the language is such as he intended should be used, will not afford him any ground of relief in equity.

DEFENDANT MAY WAIVE PROTECTION OF STATUTE OF FRAUDS, where it is sought to charge him as trustee on a contract within the statute, by admitting the contract in his answer and failing to claim the benefit of the statute.

GRANTEE HOLDS LAND IN TRUST FOR GRANTOR to the extent of the purchase-money, where he has received an absolute conveyance and has failed to make any payment of the purchase price, and such trust descends to the representatives and heirs of the grantee, against whom a lien for the purchase-money will be enforced.

CLAIM TO ENFORCE EXPRESS OR IMPLIED TRUST MAY BE JOINED in a complaint with a claim to enforce a vendor's lien existing without any written contract.

ACTION to compel execution of trust. The opinion states the facts.

J. E. N. Lewis, for the appellant.

Hatch and McQuaid, for the respondent.

By Court, **SHAFTER, J.** This action was brought by Walker, in his lifetime, to compel the execution of a trust, or, alternatively, to enforce a vendor's lien.

The complaint alleges that on or about the 6th of January, 1862, Walker and J. C. Wilson were partners in business, and were about closing up their partnership affairs; that the firm was embarrassed with debts, and that some of the creditors had commenced attachment suits against the firm; that by reason of the dissipated habits of Walker, and with a view to a more speedy liquidation of their debts, Walker executed to Wilson a deed, absolute on its face, and expressing a consideration of seventeen thousand dollars, of a certain ranch, the same being the individual property of Walker; that the deed was in fact a trust, and was made solely for the purpose of enabling Wilson to raise money, by mortgaging the premises, to pay off the debts of the firm; and that, on the day of the execution of the deed, he borrowed several large sums for the benefit of the firm, and secured the payment thereof by mortgages on the premises so conveyed to him by Walker; that Walker also, and by the same deed, conveyed to Wilson his interest in certain ditches belonging to the firm, for the purpose aforesaid, and that said ditches were included in the said mortgages; that the possession of the ranch remained with Walker after the deed as before, and that he participated as before in the management of the ditch property; that Wilson, in his lifetime, never denied the trust, but on the contrary, always admitted it; that the defendant, E. P. Wilson, his ad-

administrator and one of his heirs at law, admitted the trust in his answer first filed, but which he afterwards withdrew by the court's leave; that the grantor and grantee were intimate friends, and that the deed was given under a misapprehension as to its legal effect. Under this aspect of the complaint the plaintiff prays that the administrator may be decreed to execute the trust by reconveying the property, subject to the aforesaid mortgages.

In a supplemental complaint, filed by leave of the court and by the consent of the defendants, it is alleged as a further cause of action, that the aforesaid conveyance was in pursuance of a sale for the sum of seventeen thousand dollars, expressed in the deed; that the money is due and unpaid; that a claim for that amount was presented in due form to Wilson's administrator for allowance, June 21, 1864, together with the evidence in support of a vendor's lien on the property embraced in the deed, and that the claim was rejected by the administrator on that day. On these allegations the plaintiff claims judgment for the seventeen thousand dollars and interest thereon from the date of the deed, and that the land conveyed may be sold and the avails applied to the liquidation of the debt, and for other relief.

The complaint as amended was demurred to for want of facts, misjoinder of causes, and for uncertainty and ambiguity. The demurrer was sustained by the court, and the plaintiff declining to amend, judgment was entered dismissing the action.

1. The complaint not only fails to disclose an express trust, but it appears affirmatively that there was none; and it sets forth no facts from which a trust would arise by implication of law. Nor can the complaint be sustained as a bill to reform the deed. However Walker may have mistaken the legal effect of its terms, there is no averment that the language of the deed is not the very language which he intended to use; and against the mistake of law alleged there can be no redress. The class of cases in which mistakes of that character are corrected in equity is very limited, and this is not brought within any recognized exception to the general rule by the necessary averments: 1 Story's Eq. Jur., c. 5; *Leman v. Whitney*, 4 Russ. 424; *Russ v. Mebius*, 16 Cal. 351.

The position that the trust is rescued from the operation of the statute of frauds by the allegation that the answer first filed by the administrator admitted the trust is not tenable,

for a number of reasons, only one of which, however, need be specified here. If a defendant sought to be charged upon a contract within the statute of frauds admits the contract in his answer, and does not claim the benefit of the statute, he is considered as waiving its protection, and as furnishing, by his answer, the very proof which the statute requires. But if the admission is coupled with a claim to the protection of the statute, the rights of the party stand as though the admission had not been made: 2 Story's Eq. Jur., sec. 757. While the complaint in this case avers the admission, it fails to fill or complete the legal proposition by an averment that the statute was waived as a defense by an omission to assert it in the answer.

2. Under the second aspect in which the general transaction is presented in the complaint, the plaintiff is entitled to relief.

If, as the supplemental complaint alleges, Walker sold the land to Wilson for seventeen thousand dollars, and the purchase-money has not been paid, then the plaintiff is a creditor of Wilson's estate to that amount, and on general principles, has a lien on the land sold as security for the debt: *Leman v. Whitney*, 4 Russ. 427. To that extent, Wilson, in his lifetime, held the land in trust for his vendor, and the trust has descended to his representative and heirs. The principle upon which courts of equity proceed in establishing this lien is, that a person who has gotten the estate of another ought not, in conscience, as between them, to keep it and not pay the full consideration money: *Cahoon v. Robinson*, 6 Cal. 226; *Sparks v. Hess*, 15 Id. 192. Nor do we understand that these principles are disputed by the respondents; but they insist, first, that the claim in question is improperly joined in the complaint with the claim based upon the alleged trust; and second, that the money claimed and the lien, as collateral thereto, are barred, on the ground "that more than ten months had elapsed after the appointment and qualification of the defendant, E. P. Wilson, as administrator of J. C. Wilson, and after the first publication of notice by said administrator to the creditors of said estate requiring them to present their claims to said administrator for allowance, before the claim was in fact presented."

There is no misjoinder of causes. Both of the claims stated in the complaint are founded on trusts,—one lying in contract, and the other arising by act and operation of law:

Practice Act, sec. 64. And as to the second objection, it is sufficient to say that it does not appear, from the complaint, when the notice to creditors was first published; nor, in fact, that any publication has been made or ordered.

The objection that there can be no recovery of the seventeen thousand dollars, and no enforcement of the vendor's lien as collateral thereto, until the affairs of the partnership shall have been adjusted, is not well taken. The supplemental complaint treats the sale and conveyance of the land by Walker to Wilson as a matter having no connection with the business of the partnership, and as being, in short, what it purports to have been by the terms of the deed, — a transaction between the two men, each acting for himself alone.

The judgment is reversed and cause remanded. And it is ordered that the defendants have twenty days to answer from the time notice shall have been given them of the filing of the *remittitur*.

RELIEF IN EQUITY FROM MISTAKE OF LAW: See *Boggs v. Foster*, 76 Am. Dec. 561.

STATUTE OF FRAUDS WAIVED BY FAILURE TO PLEAD IT: *Osborne v. Elliott*, 65 Am. Dec. 498.

BOYD v. BLANKMAN.

[29 CALIFORNIA, 19.]

WHERE ADMINISTRATOR, THROUGH ANOTHER PERSON, PURCHASES AT SALE MADE BY HIMSELF, under an order of the probate court, land of his intestate, which is subsequently conveyed to him by such person, the heir retains such an equitable interest in the land as may be assigned, and the assignee may maintain an action against the administrator to enforce the trust.

HEIR RETAINS EQUITABLE TITLE TO LAND OF INTESTATE PURCHASED BY ADMINISTRATOR, through another person, at a sale thereof made by him under an order of the probate court, and the heir's deed conveys such equitable title, although the legal title is held by the administrator in trust. And the execution of such deed is evidence of the heir's intention to disaffirm the sale.

UNTIL HEIR AFFIRMS SALE BY ADMINISTRATOR OF LAND OF INTESTATE, at which he himself, *per interpositam personam*, became the purchaser, the relation of trustee and *cestui que trust* between them is not shifted from the land to the proceeds of the sale of it.

PURCHASE, THROUGH ANOTHER PERSON, OF LAND OF INTESTATE BY ADMINISTRATOR, at his own sale, is not void, but only voidable at the election of the heirs or other persons interested in the estate, who may have the sale set aside and the administrator declared a trustee.

ORDER OF SALE OF REAL ESTATE, MADE BY PROBATE COURT HAVING ACQUIRED JURISDICTION, cannot be attacked in a collateral proceeding on the ground that it was made upon insufficient evidence or contrary to the evidence, or because the sale of a small portion of it would have been sufficient, or because the administrator procured it to be made to pay a debt which had previously been paid with funds of the estate.

FACT THAT PERSON IS UNLEARNED AND IGNORANT OF LEGAL PROCEEDINGS AFFORDS NO GROUND OF RELIEF in equity, unless it also appears that he relied for information upon the person against whom relief is sought, and the latter misrepresented the state of the facts.

STATUTE OF LIMITATIONS IS APPLICABLE TO CAUSES OF ACTION IN EQUITY as well as to those at law.

COMPLAINT IN ACTION FOR RELIEF ON GROUND OF FRAUD SHOULD AVER that the acts constituting the fraud had been discovered within three years; but if the replication contains such an averment, and this issue is tried without objection, the irregularity in the mode of presenting the issue will be disregarded.

DEFENDANT RELYING ON STATUTE OF LIMITATIONS MUST ALLEGE, NOT MATTER OF LAW, but the facts which bring the case within the operation of the statute.

IF PLAINTIFF FAILS TO STATE TRULY TIME WHEN HIS CAUSE OF ACTION ACCRUED, the defendant may aver the truth in that respect, and if it is established on the trial, he will secure the same result that he would have secured by demurrer had the plaintiff's complaint truly stated the time when the cause of action accrued.

CASES OF CONSTRUCTIVE FRAUD ARE WITHIN SAVING CLAUSE of section 17 of the statute of limitations, which provides that an action for relief on the ground of fraud shall not be deemed to have accrued until the discovery of the facts constituting the fraud.

ACTION FOR RELIEF ON GROUND OF FRAUD MAY BE COMMENCED AT ANY TIME within three years after a discovery of the facts constituting the fraud, or of facts sufficient to put a person of ordinary intelligence and prudence on inquiry.

ACTION to establish and enforce a trust. Jack Hina died intestate on the 3d of October, 1850, leaving his widow, Mary Hina, his sole heir. Mary Hina and the defendant, Blankman, were appointed administrators of the estate of the deceased. The lot of land in controversy in this action was at the time of Hina's death subject to a mortgage for seven hundred dollars, bearing interest at the rate of ten per cent per month. On the 16th of December, 1850, the defendant, without joining Mary Hina, petitioned the probate court for an order to sell the premises for the purpose of paying this mortgage debt and the expenses of administration. While these proceedings were pending in the probate court, Blankman paid the amount due on the mortgage, and caused the mortgage to be assigned to one Bidleman, for his, Blankman's, benefit. Blankman subsequently obtained the order for sale, and under it had the property sold at public auction on the 15th of Feb-

ruary, 1851, to one Reis for \$1450, and a conveyance was made by Blankman, as administrator, to said Reis, but in fact for the benefit of the defendant, Blankman, no money being in fact paid by Reis. On the 10th of April, 1851, Reis conveyed to Bidleman, who took the conveyance and held the land in trust thereunder for the benefit of Blankman. On the 19th of February, 1851, Blankman caused an action to be commenced by Bidleman against Blankman and Reis for the foreclosure of the mortgage. A decree was rendered in this action, with the written consent of the defendants therein, and the premises were sold thereunder on the 31st of March, 1851, to Bidleman, for \$858, but in fact for the benefit of Blankman. On the 1st of April, 1851, the sheriff executed a deed of the premises to Bidleman, who took the same in trust and for the benefit of Blankman. In the same month, Blankman caused Bidleman to bring an action against Mary Hina to recover possession of the premises. The plaintiff in that action recovered a judgment, and on the 12th of June, 1851, Mary Hina was removed from the premises under an execution issued on that judgment. On the 20th of December, 1851, Bidleman conveyed the premises to Blankman for an expressed consideration of fifteen hundred dollars, but no consideration was in fact paid or agreed to be paid. This deed was duly recorded on the 3d of January, 1852. About June, 1851, Mary Hina left San Francisco, where the lot of land above mentioned is situated, and never returned thereto until after the commencement of this action. On the 18th of April, 1851, Blankman was discharged as administrator, after settlement of his final account. On the 28th of February, 1861, Mary Hina sold, assigned, transferred, and conveyed to the plaintiff the said premises, and all her rights and interests therein and her claim thereto, and to the rents during the time Blankman held and enjoyed the same. Just before the commencement of this action, in 1861, Bidleman for the first time informed Mary Hina that he purchased the property in trust for Blankman, at Blankman's request, and paid no consideration for it. The court below found that there was no fraud in fact, and also found that the knowledge that the purchase and sale of the property at the probate and foreclosure sales were made in trust for defendant, Blankman, came to the knowledge of Mary Hina more than five years before the commencement of the action. There was a judgment for the defendant, and the plaintiff appealed. The other facts are stated in the opinion.

Doyle and Barber, and Delos Lake, for the appellant.

E. W. F. Sloan, for the respondent.

By Court, RHODES, J. This action was brought to establish and enforce a trust in favor of the plaintiff, as the grantee and assignee of Mary Hina, the heir at law of Jack Hina, deceased, as to certain premises that the defendant purchased at his own sale as administrator; and as incidental to the relief sought in respect to the alleged trust, the plaintiff prayed for an account of the rents and profits, and for the delivery of the possession of the premises.

The mortgage executed by Jack Hina in his lifetime, which it is alleged the defendant fraudulently procured to be assigned and foreclosed, and the sale and conveyance of the premises, which it is alleged were fraudulently made for the benefit of the defendant, may be dismissed from consideration except so far as those matters bear upon the question of fraud in procuring the order of sale from the probate court, as the legal title, which was then in Mary Hina, was unaffected by those proceedings, because she was not made a party to the foreclosure suit. The questions we shall first consider grown out of the fact charged by the plaintiff, and found by the court below, that the defendant, while acting as one of the administrators of Jack Hina, deceased, purchased the premises *per interpositam personam* at his own sale, which he made under the order of the probate court. It is alleged in the complaint that the proceedings in the probate court for the purpose of procuring the sale, and the sale itself, and all proceedings connected therewith, are wholly fraudulent and void. The plaintiff's counsel, however, contends that the sale is void only at the instance of the *cestui que trust*,—that is to say, that the sale is voidable. His position is that Blankman, in selling the property as administrator, acted as the trustee of the heir; that his sale to himself did not discharge the trust; that the heir, as the *cestui que trust*, possessed the right to affirm or disaffirm the sale, and that such right was incident to the equitable estate which she possessed in the property. The defendant's position is that the sale was voidable only at the election of the heir, and coupled with that is the further position that by the sale she became divested of every assignable right or interest in the land.

Effect of purchase by an administrator at his own sale, made by order of the probate court, of land belonging to the estate.—

We may say here that we cannot assent to the latter position of the defendant. If it is admitted that anything passed by the sale, it must be conceded that the legal title passed; and after the administration is closed it would be difficult to charge the defendant as trustee in respect to the real property, unless he was vested with the legal title; but in regard to the equitable title, we are of the opinion that Mary Hina, by her deed to the plaintiff, gave evidence of her determination to disaffirm the sale; that at the time of its execution she held the equitable title as fully as before the sale, and that by her deed she conveyed such equitable title to the plaintiff. And it admits of serious doubt whether the sale, confessedly in contravention of the rules of equity, even temporarily "set afloat" her equitable interest, so that an act of disaffirmance was necessary in order to attach it again to the property. There are strong reasons for holding that upon a sale of this character the relation of the *cestui que trust* is not by that fact alone shifted from the property to the proceeds of the sale, but that in order to cut her off from any recourse upon the land, and restrict her to the proceeds, there must be either some positive act of affirmance of the sale, or such an acquiescence in it, manifested by the receipt of the proceeds, or by a delay beyond the period fixed by the statute of limitation in commencing proceedings to set it aside, or in some other manner, that the court will deem it equivalent to and presumptively a ratification of the sale. By her disaffirmance she elects to have the legal title held as it was before the sale, and have the property remain subject to all the trusts with which it was formerly charged. In the absence of a disaffirmance, that is to say, of an assertion of her interest in the land within a reasonable time, the equitable interest of the *cestui que trust* is presumed to have become united to the legal title in the hands of the trustee holding adversely to the *cestui que trust*. An illustration may be found in the case of a will that gives to any legatee a portion of the estate of the testator, and to another legatee some of the first legatee's property. The will of itself does not divest the first legatee of any title to his own property, but his affirmance of the disposition made by the will, manifested by his election to take under it, is held in equity to pass his interest in what was his own property to the second legatee; and if he relies upon his right independent of the will, it cannot be said that he was at any time even temporarily divested of the title to his property that was attempted to be bequeathed. The right

of election in the *cestui que trust* to affirm or disaffirm the sale must have for its support some interest in the premises sold. He cannot acquire the equitable title by mere assertion, nor can it with much show of reason be said that by indicating his election to have the legal title restored to its original status, he acquires any right or title he did not possess before making the election.

Sale of the trust estate and purchase of same by the trustee who holds the legal title.— In a case where the trustee holds the legal title, and the trust is to be executed by a sale of the property for money, and the trustee becomes the purchaser, and holds in his hands the money representing the purchase-money, ready to be paid over to the *cestui que trust*, the money evidently is not the money of the *cestui que trust* as it would be considered had the sale been properly made to a third person, and it does not become his property until he elects to affirm the sale and receive the money; and if it is true that the purchase by the trustee divests the *cestui que trust* of his equitable interest in the land, then it follows that there is a time—the time intervening between the sale and the election by the *cestui que trust*—that he owns neither an interest in the land nor the money arising from its sale. Instead of saying, in the language of many of the cases, that the sale as between the trustee and *cestui que trust* is good unless the *cestui que trust* elects to avoid it, is it not more accurate to hold that the sale will become good unless the *cestui que trust* elects to avoid it before its ratification may be presumed from the lapse of time or other sufficient circumstances?

Is the purchase by an administrator of the land of the estate, at his own sale, void? or is it merely voidable?— Is the sale void? or is it merely voidable? The doctrine that a purchase of the trust property by a trustee for sale, made at his own sale, whether the purchase is affected by himself or through the interposition of another person, is voidable at the election of the *cestui que trust*, is as firmly established, and is supported by as clear and satisfactory reasons, as any rule in equity. Both parties hold that it was only voidable, and yet the question is involved in much perplexity, and when tested by the rules applicable to such cases, some doubt still remains. An administrator is the creature of the statute. He has no existence independent of the statute, and in taking upon himself the duties and trusts created by it, he assumes them with all the clogs and restrictions the statute has attached to the

office. Those restrictions may be other or greater than those controlling persons acting under private appointment, in a capacity very analogous to that of an administrator, but the person accepting the trust takes it not only with the powers, but with disabilities incident to the position. Among the restrictions is that contained in section 193 of the probate act, that "no executor or administrator shall, directly or indirectly, purchase any property of the estate which he represents." This provision cannot be said to be in affirmance of the common law, for at law it was held that the legal title did pass by the purchase of the trustee, effected through the agency of a third person at the trustee's sale of the property, and it was only in a court of equity that the sale was held not to pass the title: *Jackson v. Van Dalsen*, 5 Johns. 43; *Davoue v. Fanning*, 2 Johns. Ch. 252. Regarding the section as creating a personal disability to take property,—as depriving him of the power and capacity to receive and hold the title for any purpose,—it would seem impossible to escape the conclusion that the sale would be absolutely void. A conveyance made by the administrator to himself is *ipso facto* void without regard to section 193, for it bears its own invalidity upon its face. But the conveyance to a third person after a sale to him, and a confirmation of the sale, although secretly made for the use of the administrator, gives such person a *prima facie* title to the land, and the invalidity of the title is made to appear upon the fact being ascertained and determined in the proper court that the purchase was made by the administrator *per interpositam personam*. Before that fact is determined there would seem to be but little if any doubt that the third person who had taken the title for the administrator could pass it to a *bona fide* purchaser for a valuable consideration without notice of the fraudulent purchase. It is true that if the sale is held to be absolutely void, he could not pass the title to an innocent purchaser; but the rules of equity, which were devised to protect the *bona fide* purchaser as well as the *cestui que trust*, would forbid that result, if it could be avoided consistently with the statute. The grantee of the purchaser at the administrator's sale, after having made all the inquiries that could be required of a prudent man, might be at the mercy of a fraudulent conspiracy between the persons interested in the administrator's sale, resulting in the proof that the sale that had in truth been made to the purchaser named was in fact made to the administrator, through the interven-

tion of the nominal purchaser. On the other hand, the *cestui que trust*, if the administrator in fact purchased at his own sale, has several remedies which may afford him adequate relief. He may have the sale set aside and the administrator declared a trustee; he may sue upon the administrator's bond, or he may proceed to recover the penalty of double the value of the land sold, according to section 189 of the probate act.

A conveyance cannot be said to be utterly void unless it is of no effect whatsoever, and is incapable of confirmation or ratification. The acceptance of the purchase-money, with full notice that the administrator was the purchaser, *per interpositam personam*, would unquestionably amount to a ratification of the sale. The court would not countenance a partial disaffirmance of the sale that would enable the *cestui que trust* to hold on to the purchase-money, and at the same time recover the land: *Terrill v. Auchauer*, 14 Ohio St. 80.

It is said by Mr. Chief Justice Spencer, in *Anderson v. Roberts*, 18 Johns. 528 [9 Am. Dec. 235]: "Whenever the act done takes effect as to some purposes, and is void as to persons who have an interest in impeaching it, the act is not a nullity, and therefore, in a legal sense, is not utterly void, but merely voidable. Another test of a void act or deed is, that every stranger may take advantage of it, but not of a voidable one." It is not declared by the statute that the purchase by the administrator is utterly void, but if it is held that the prohibition against his purchasing amounts to that in effect, it does not necessarily follow that strangers can allege that the sale is void.

The statutes of the 13th and 27th Elizabeth, and the statutes of the states having the same general purpose, declare that sales, etc., made to hinder, delay, or defraud creditors, shall be absolutely void, and the cases both in England and the United States holding that those sales are void only at the instance of the parties injured are too familiar and numerous to require citation. In *Greene v. Kemp*, 13 Mass. 515 [7 Am. Dec. 169], the purchaser of the equity of redemption attempted to set up and rely upon the statute declaring that mortgages, etc., tainted with usury, were "utterly void" for the purpose of defeating a recovery of the possession of the mortgaged premises by the mortgagee, who had foreclosed; but the court held that the mortgage was merely voidable, and that as the defendant was a stranger to the mortgage transaction, and possessed no title in the land, but only a right to redeem, he

could not rely upon that defense, and that only the mortgagor and those who may lawfully hold the estate under him could set up the usury: See also *Jackson v. Henry*, 10 Johns. 195 [6 Am. Dec. 328]; *Dix v. Van Wyck*, 2 Hill, 522.

An examination of the probate act will disclose the intent of section 193, and it is apparent that the object was not to declare who might or who might not become a purchaser of the property of the estate, but it was to prevent the property from being sold at a price less than its true value, which might be the case if the administrator, either directly or indirectly, prevented competition among the bidders by entering into the market, either personally or by his agents, or if, with a view of purchasing, he was tempted to undervalue the property in his proceedings respecting the sale. The protection to the estate designed by that section can be as fully secured by permitting the parties interested in the estate to set the sale aside and have the administrator declared a trustee, as it would be to construe the section so as to allow strangers to impeach the sale, with the consequent risk to the *bona fide* purchaser, without notice from the administrator's agent, of losing the premises he purchased, relying on the apparent regularity of the probate proceedings and the confirmation of the sale.

The terms "void" and "voidable" are not always employed, either in the statutes or reports, with strict legal accuracy; but we find no case which, when critically examined in connection with the character of the action and the facts of the case, holds sales made in the face of a prohibition, such as is found in section 193, to be utterly void. Many cases are found in which the *cestui que trust* or his heirs have sued to set aside the sale, or to have the trust established and declared, and in those cases the courts have said that the sales were void, or were fraudulent and void; that is to say, that when the *cestui que trust*, or those claiming title under him, manifest their election to disaffirm the sale, and commence a suit to set it aside, the court pronounces the purchase by the trustee at his own sale void as against the *cestui que trust*, and sets it aside, and declares the trustee still a trustee, and orders a new sale, or affords such other relief as the exigencies of the case demand. Such was the case of *Michoud v. Girod*, 4 How. 503, which was a suit in equity by certain heirs of a deceased testator against the legal representatives of one of his executors, who was also one of the heirs, to obtain the complainant's just share of the estate of the testator. The two executors had purchased the

property of the testator through an agent, and one of the executors purchased of his co-executor his half of the property; and the executor who held all the property having died, the suit was brought against his legal representatives. It will be seen that there were no "strangers" to the transaction among either of the parties. The complainants alleged that the sales were fraudulently made, and the defendants denied fraud in fact or intention on the part of the executors, and alleged that the sales were judicially ordered and conducted, that the purchases were rightfully made for a fair price, and at public auction. The court held that it would not in such a case enter into an investigation as to whether there was fraud in fact, or whether the sale was for a fair price, and made at public auction; but that upon its being made to appear that the trustee had purchased at his own sale, the court would set the sale aside as fraudulent and void as against the *cestui que trust*, without further inquiry. The language employed by Mr. Justice Wayne, in delivering the opinion of the court, is comprehensive enough to express that the sale was absolutely void; but that point was not involved in the case, for if the sale was held to be fraudulent and void at the instance of the *cestui que trust*, that disposed of all the questions arising upon that branch of the case; and as we have remarked, there were no strangers to the transaction before the court; but as plaintiffs, only some of the heirs of the testator, and the representatives of other of the heirs; and as defendants, the representatives of one of the executors. That the court did not intend to go further than to hold the sale voidable appears from the fact that the rule as to the disability to purchase, cited from Sir Edward Sugden, is, in the language of the court, "the rule as to persons incapable of purchasing particular property except under particular restraints, on account of the rules of equity," and according to those rules the sale was merely voidable; also from the fact that the cases cited by the court, among which *Davoue v. Fanning*, 2 Johns. Ch. 252, is relied on as a "critical and able review of the doctrine, as applied by the English courts of chancery from an early day, and has been received, with very few exceptions by our state chancery courts, as altogether putting the rule upon its proper footing," hold that those sales are merely voidable; and from the further fact that the court proceeded to set aside the sale complained of, which was a useless proceeding if it was absolutely void.

Hardy v. De Leon, 5 Tex. 216, appears by a series of amend-

ments to have been converted from an action to recover the possession of the premises into a suit in equity to set aside a certain tax sale and an administrator's sale, which had been procured by the fraudulent combination of the defendants. The plaintiffs were the heirs at law of De Leon, deceased, and the defendants were the administrators of De Leon and the purchasers at the tax sale and the administrator's sale. The person who, it was alleged, purchased and took the title for the administrator, and who still held the title, was made a defendant. No other person than the administrator and the purchasers were made defendants, and consequently the question whether the sale was absolutely void did not arise. On this subject the court limit their remarks to one short paragraph, and say that "a person cannot be both buyer and seller at the same time"; and after stating the rule on that subject as given by Chancellor Kent (4 Kent's Com., 5th ed., 438), say: "It therefore was not error to instruct the jury in effect that a purchase made by a sheriff or an administrator at his own sale is deemed fraudulent in law, and that a fraudulent sale is void. *Prima facie* the sale so made was void, and there do not appear to be any circumstances in the case requiring the court to consider the qualifications to which the rule may be subject." No statute is mentioned that prohibits such a sale, and the rule referred to was the rule in equity, and was not the rule at law, except in case where the sale was made by the administrator directly to himself, which would be void on its face, because there would be but one party to the nominal contract; and as the case called for no expression of opinion whether a sale by the administrator to himself, through the agency of a third person, was a complete nullity, we think the language, that the sale "is deemed fraudulent in law," was inadvertently used, the court merely intending to declare that the sale was fraudulent and void at the election of the heirs of the deceased. That such was the meaning of the court, is very manifest, for Chancellor Kent, in immediate connection with the passages cited by the court, says: "It may be here observed, as a general rule applicable to sales, that where a trustee of any description, or any person acting as agent for others, sells a trust estate, and becomes himself interested, either directly or indirectly, in the purchase, the *cestui que trust* is entitled as of course, in his election, to acquiesce in the sale or to have the property re-exposed to sale, under the direction of the court," etc.

We have very clear and pointed authority on this question in the case of *Terrill v. Auchauer*, 14 Ohio St. 80. It is provided by the statute of Ohio that "no sheriff or other officer making the sale of property, either personal or real, nor any appraiser of such property, shall either directly or indirectly purchase the same; and every purchase so made shall be considered fraudulent and void." The defendant, who had been one of the appraisers of the land at a foreclosure sale, purchased the land, received a deed, and went into possession. The plaintiff, who claimed under a deed of trust, brought an action to recover the possession of the land. The court say, in substance, that the mischief which the statute aims to prevent is obviously that which arises from fraudulent appraisements, made with a view to the individual advantage of the appraiser, when he becomes a bidder at the sale, and that the mischief is as effectually prevented by holding the sale to be voidable at the option of the parties interested, on a proceeding for that purpose, as it would be by holding it to be an absolute nullity; while the injurious consequences may be avoided which would often follow if the sale be held to be strictly void. We attach far less force to the argument of the court in that case, drawn from the construction of the word "considered" in the clause of the act declaring that "every purchase so made shall be considered fraudulent and void," as indicating that the purchase shall be held void when so adjudged by the court, in a proceeding to avoid the sale, than we do to the other reasons advanced by the court, and particularly those supported by the cases cited, — *King v. Inhabitants of Hipswell*, 8 Barn. & C. 471, *Pearse v. Morrice*, 2 Ad. & E. 94, and *Anderson v. Roberts*, 18 Johns. 529 [9 Am. Dec. 235], — holding that the word "void" will be construed as "voidable" when the provision is introduced for the benefit of the parties only, and not for public purposes, and to protect those who are incapable of protecting themselves.

We are of the opinion that by holding the sale to be void at the election of the heirs or other persons interested in the estate, the mischief intended to be prevented by the statute will be obviated, and at the same time those who in good faith and without notice of the constructive fraud of the administrator have acquired the title through the agent who purchased the property for the use of the administrator will be protected from losses, which otherwise could only be effectually provided against by an utter refusal to purchase property that had been sold at an administrator's sale.

Fraud by an administrator in procuring an order of sale of land without necessity. — Actual fraud is alleged and relied on by the plaintiff, and he assigns as error the finding of the court against him on that issue. The fraud complained of, stated generally, consisted in the administrator's having procured an order of sale from the probate court when there was no necessity for it. He represented in his petition, filed December 18, 1850, that the estate was indebted \$770 on the Biron mortgage, and about two hundred dollars for other debts, and that the personal property was insufficient to pay the debts and the expenses of administration. His final account, filed April 2, 1851, shows that on the 23d of October, 1850, he received from Mary Hina \$890 on account of the estate. Instead of applying the money to the satisfaction of the mortgage, he purchased it in the name of Bidleman for his own benefit. Doubtless the interest for two months—\$140—was paid out of the money paid to him by Mary Hina. So far as the order of sale is concerned, and the fraud imputed to the defendant in procuring it without any necessity, it would make no difference whether he left the mortgage unpaid in Biron's hands or caused it to be assigned to himself or to some third person for his use, for he, having the funds in his hands, that might and ought to have been applied to the satisfaction of the mortgage, he should have taken the necessary steps to have procured an order that the funds in his hands be applied to that purpose; and the wrong consists in the fact that he procured an order of sale to raise money to satisfy a debt which either had been paid or ought to have been paid out of moneys in his hands belonging to the estate. The administrator was without justification, so far as appears from the evidence, in procuring an order of sale to raise means to pay that debt. The payment might have been made soon after the receipt of the money in October, and at that time the payment of the mortgage and two months' interest, requiring \$840, would have left in his hands fifty dollars. It is not charged, nor does it appear in the case, that any of the property of the estate, except the sum of \$890 and the lot in controversy, came to the possession of the defendant, and we may presume that the articles included in the inventory under the items, "stoves, chairs, and household furniture, two hundred dollars, trunk and clothes, one hundred dollars," remained in the possession of the widow of the deceased; and it is not alleged that they came to the defendant's hands. At the time of filing the

petition for sale, there had been allowed the claims of appraisers and others, amounting to \$210; and although the claims may seem exorbitant, yet they had been allowed by the probate judge as well as the administrator; and as valid claims against the estate, they, together with administrator's fees accruing and accrued, were required to be paid; and the administrator, not having funds in his hands sufficient for that purpose, was authorized, and it was his duty, to have raised the required funds out of the real estate by sale or otherwise. A sale of a small portion of the real estate would probably have been sufficient; but the probate court had jurisdiction, and we think the exclusive jurisdiction, to determine what portion of the real estate should be sold for that purpose; and although the court may have erred in that respect, its judgment cannot be revised or set aside in this collateral manner. The error can be reached only by an appeal taken directly from the order of that court.

And the same may be said in respect to the order of sale, so far as it is founded on the alleged indebtedness on the mortgage, conceding that it had been paid (considering the assignment to Bidleman for the defendant as a payment by the estate, or as vesting the mortgage in the estate), or that it was not a subsisting claim against the estate, or that it ought to have been paid by the administrator, still those were facts to have been proven before the probate court, on the hearing of the petition for sale. It is manifest that it was quite susceptible of proof, that the administrator had in his hands funds that should have been used for that purpose; and if those interested in the estate failed to offer the evidence, they are in default; and if it was offered and was rejected by the court, or having been received, the court, notwithstanding the evidence, ordered the lot to be sold for the payment of the mortgage, it was error, which might have been corrected on appeal; but if not so corrected, was final and conclusive upon the parties to the petition. The fraud, then, in procuring the order of sale, so far as the mortgage debt is concerned, amounts to this: that the administrator procured an order, either upon insufficient evidence, or contrary to the evidence that was accessible to the heir at law, and was or might have been introduced by her, which, instead of being a fraud of which another court will take cognizance, is but the case of an error in the judgment of the probate court, or of neglect on the part of one of the parties to present his case; and we

agree with the learned judge of the court below in his finding, that there was no actual fraud in procuring the order of sale, and in holding that in relation to the necessity or the sale, the plaintiff is concluded by the order declaring that it was necessary, and directing it to be made.

Ignorance as a ground of relief in equity.—It is proper to remark here, that we do not concede as much force and consequence as do the counsel for the plaintiff to the fact that Mary Hina was an ignorant kanaka woman, unacquainted with legal proceedings, and almost ignorant of our language. We cannot obliterate the recognized rules of law, requiring of all persons the diligence and attention demanded of a prudent man in the transaction of his own business, and establish a measure of care and diligence for each particular case. If she did not understand the value of the receipt she said Blankman gave her for the money she paid him, or if she did not comprehend the meaning or the object of the petition for sale, unless it is also proven that she relied upon Blankman for information respecting those matters, and that he misrepresented them, her ignorance of their objects, value, and meaning affords no grounds for relief.

Statute of limitations.—The defendant relies on the statute of limitations as a defense to the action. The statute is applicable alike to all causes of action,—to a cause of action in equity as well as one at law. The statute governing this case is found in the fourth subdivision of division 8 of section 17 of the act concerning the limitations of civil actions, which is as follows: "Within three years . . . an action for relief on the ground of fraud, the cause of action in such case not to be deemed to have accrued until the discovery by the aggrieved party of the facts constituting the fraud." The cause of action accrued in 1851, the date of the purchase by Reis for the defendant at his sale as administrator. The defendant, in his answer, says "that the pretended cause of action in said complaint set forth did not accrue at any time within five years next before the commencement of this action, and he sets up and relies upon the statute in such case made and provided in bar of said action, as if herein specially pleaded." The plaintiff in his replication denies "that the pretended cause of action, in said complaint set forth, did not accrue at any time within four years next before the commencement of this action"; and for a further replication he says "that the several acts of fraud, set forth and alleged in said complaint,

were not discovered by said Mary Hina or this plaintiff until within three years next preceding the commencement of this action." The court found "that the knowledge that the purchase of said premises at the probate sale and at the foreclosure sale were made, and the lands held thereunder for the benefit of and in trust for the defendant, Blankman, did come to Mary Hina more than five years before the commencement of this action." As the acts constituting the fraud complained of are alleged to have been committed more three years before the commencement of the action, the complaint should have stated the discovery of them within the three years: *Sublette v. Tinney*, 9 Cal. 423; but as the discovery within the three years is averred in general terms in the replication, and the issue thereupon was tried without objection in the court below, the finding will be taken as if made upon an issue properly raised by the pleadings.

It is objected that the defendant has not set up the particular statute of limitations applicable to cases of this nature, and that in order to avail himself of the benefits of any of the provisions of the statute he should have pleaded all the statutes upon which he intended to rely, in separate defenses.

The defendant, relying for answer upon any provision of the statute of limitations, is not required, nor do the rules of pleading permit him, to allege matter of law. The facts are required to be stated which bring the case within the operation of the statute, and the court will apply to them the law. To an action of ejectment the defendant pleads that the cause of action did not accrue within ten years next before the commencement of the action. This, though negative in form, is in fact an affirmative answer, and is in effect an averment that the cause of action accrued more than ten years before the commencement of the action. When tested by a demurrer, it will be found to be sufficient, for if it accrued more than ten, it must have accrued more than five years next before the commencement of the action. The nature of the action, not the allegations of the defendant, will determine what statute is applicable as a bar to a recovery.

When the defendant demurs on the ground of the statute of limitations to a complaint, on the face of which it appears that the cause of action accrued anterior to the longest period prescribed as a bar, the demurrer is sustained, not because the complaint states as the time when the cause of action accrued any period, the time from which to the commencement of the

action corresponds with the time prescribed in any particular statute as a bar, but because the time as stated since it accrued exceeds the time defined as a limitation of actions of that nature. If the plaintiff fails to state truly one of the essential parts of his cause of action, to wit, the time when it accrued, which, if stated truly, would show that he had no subsisting cause of action, it is impossible to see why the defendant may not aver the truth in that respect, and if it is established on the trial, secure the same result.

The court below found that the knowledge that the purchase of the premises at the probate sale was made for the benefit of and in trust for the defendant came to Mary Hina more than five years before the commencement of this action, and the plaintiff complains of the finding on the ground that it was unsupported by the evidence. The defendant contends that the saving clause of section 17 of the statute of limitations is applicable only to actions founded on fraud in fact. The rights of a party seeking relief on the ground of constructive fraud in an action cognizable only in equity were conserved until a discovery by the aggrieved party of the facts constituting the fraud, and as the statute of limitations is now applicable alike to all causes of action, it would be but reasonable to hold that parties should have the benefit of the saving clauses of the statute in that class of cases as well as those that were formerly within the statute, if it can properly bear that construction; and as neither the limitation nor the saving clause is confined to cases of actual fraud, we see no reason for giving the statute the restricted construction claimed for it by the defendant.

The evidence in the record fails to show a discovery by Mary Hina of the fact constituting the fraud—that is, of the purchase of the property by the defendant, *per interpositam personam*, at his own sale—within three years next before the commencement of the action; nor does it appear that the facts actually or presumptively within her knowledge were sufficient to have put her, as a person of ordinary intelligence and prudence, upon inquiry. She is chargeable with knowledge of the state of the account between the defendant and the estate; of the petition for sale and the orders and proceedings thereon, and of the conveyance to Reis; and it may be conceded for the purpose of this question that she knew that the defendant, instead of satisfying the Biron mortgage, procured it to be assigned to Bidleman, who foreclosed it and purchased the

premises for the defendant's use at the foreclosure sale; that Reis conveyed the premises to Bidleman, who afterwards conveyed them to the defendant; that she believed, when she was turned out of possession by the sheriff under the writ issued upon the judgment in ejectment recovered against her by Bidleman, that she was dispossessed by the defendant; and that she consulted counsel, or attempted so to do, about recovering the lot from the defendant. But all these facts are consistent with the apparent fact that Reis purchased in good faith for his own use, and they were not sufficient to put her upon inquiry as to the true character of his purchase. The fact that she cherished her claim to the lot, and intended, at some time, to institute proceedings for its recovery from the defendant, falls short of proving that she knew or had any intimation of the capacity in which Reis acted in making the purchase. The respondent's counsel admits that Mary Hina may not have discovered for a time that the respondent became the purchaser through the intervention of another; and we are unable to find any evidence in the record tending to show that she afterwards made the discovery or was put upon inquiry, until her conversation with Bidleman in 1861.

Judgment reversed, and cause remanded for a new trial.

CURREY and SAWYER, JJ., being disqualified, did not sit in the cause.

TITLE TO REAL ESTATE OF ANCESTOR, ON HIS DEATH, VESTS IN HIS HEIRS: See *Walbridge v. Day*, 83 Am. Dec. 227, note 230, where other cases are collected.

TRUSTEE CANNOT PURCHASE AT HIS OWN SALE, DIRECTLY OR INDIRECTLY: See *Hoffman S. O. Co. v. Cumberland C. & I. Co.*, 77 Am. Dec. 311, note 323, where the cases are collected; *Gardner v. Ogden*, 78 Id. 192, note 211; *San Diego v. San Diego & L. A. R. R. Co.*, 44 Cal. 114; *Guerrero v. Ballerino*, 43 Id. 121, both citing the principal case.

PURCHASE MADE BY EXECUTOR IN VIOLATION OF STATUTE IS NOT ABSOLUTELY VOID, but only voidable, and may be ratified by the persons at whose instance it is voidable: *White v. Iseline*, 26 Minn. 490, citing the principal case; *Flanders v. Flanders*, 68 Am. Dec. 523, note 527. The fraud of a party does not render the transaction absolutely void, but merely affords the ground to have it declared void by a proper proceeding: *Murchison v. White*, 54 Tex. 85, citing the principal case.

ORDER OF SALE OF REAL ESTATE BY PROBATE COURT WILL NOT BE COLATERALLY REVIEWED, WHEN: See *Long v. Burnett*, 81 Am. Dec. 420, note 427, where other cases are collected.

WHERE RELIEF IS SOUGHT ON GROUND OF FRAUD, STATUTE OF LIMITATIONS BEGINS TO RUN only from the time of the discovery of the facts constituting the fraud: *Adams v. Guerd*, 76 Am. Dec. 624, note 630, where

other cases are collected; *Owry v. Allen*, 34 Cal. 258, citing the principal case.

IN CALIFORNIA, STATUTE OF LIMITATIONS APPLIES TO SUITS IN EQUITY, as well as to actions at law: *Case of Brederick's Will*, 21 Wall. 518, citing the principal case.

PLEADING STATUTE OF LIMITATIONS: See *Backus v. Clark*, 83 Am. Dec. 437, note 443, where other cases are collected. Where the plaintiff's complaint shows that his cause of action is barred by the statute, he must plead the exceptions, or his complaint will be bad on demurrer: *Young v. Whittenhall*, 15 Kan. 582, citing the principal case.

BOARD OF COMMISSIONERS OF THE FUNDED DEBT OF THE CITY OF SAN JOSE v. YOUNGER.

[29 CALIFORNIA, 147.]

RIGHT OF ATTORNEY OF RECORD TO CONTROL AND MANAGE ACTION cannot be questioned by the opposite party while he remains such attorney.

PARTY TO ACTION MAY APPEAR IN HIS OWN PROPER PERSON or by attorney, but he cannot do both. If he appears by attorney, he must be heard through him, and cannot himself assume control of the case.

COURT SHOULD NOT DISMISS ACTION WITHOUT CONSENT OF ATTORNEY OF RECORD, although the plaintiff, who has appeared by attorney, stipulates in writing that it be dismissed.

APPEAL from an order dismissing the action. The opinion states the case.

S. O. Houghton, for the appellant.

C. T. Ryland and C. B. Younger, in *propria persona*, for the respondent.

By Court, SANDERSON, C. J. This is an appeal from an order dismissing the action, made under the following circumstances:—

The action was tried and a final judgment entered therein in favor of the plaintiffs on the 20th of January, 1864. On the tenth day of January, 1865, the motion of the defendant for a new trial was granted. On the 19th of January, 1865, counsel for the defendant filed in court a stipulation, signed by the commissioners of the funded debt of San José in person, and not by their attorney of record, to the effect that the matters in controversy had been settled, and that the action might be dismissed, and also a receipt, signed by the treasurer of the board, in full payment for the land, to set aside the conveyance of which, on the ground of fraud, this action was brought, and thereupon moved the court to dismiss the action, ground-

ing his motion upon the 148th section of the practice act, which provides, among other things, that an action may be dismissed by either party upon the written consent of the other. This motion was resisted by the attorney of record of the plaintiffs, and a counter-motion was made by him to strike the stipulation from the files of the court. Both motions were heard together, upon affidavits presented by both parties, and the motion of the defendant finally prevailed.

It appears from the affidavits that the action was commenced and prosecuted for the purpose of reforming a deed of certain land held by the plaintiffs, in their capacity of trustees, to the defendant, on the ground of fraud, under an agreement with one Gish (who claimed that, under the rules and regulations of the board of commissioners touching the sale of land so held by them, he was entitled over the defendant to become the purchaser of the land so sold and conveyed to him) to the effect that if a reconveyance could be obtained from the defendant, either voluntarily or by a resort to the courts, they would thereafter convey to him, he agreeing to pay all costs and expenses, including the fees of counsel. And it further appears that Gish employed counsel, and up to the time the order in question was made, prosecuted the case in all respects at his own expense, and that neither he nor the attorney of record so employed by him ever assented to the stipulation dismissing the action signed by the plaintiffs.

It also appears that the commissioners settled the case and authorized its dismissal under a misapprehension as to its true condition, and that they would not have done so had they been fully advised.

It is first contended on the part of the respondent that this appeal is being prosecuted, like the action itself prior to its dismissal, by Gish, and not by the plaintiffs. In answer, it is sufficient to say that the appeal has been taken and is being prosecuted by the plaintiffs' attorney of record, and while he remains attorney of record, his right to manage and control the action cannot be questioned. Whether, in taking the appeal, he has gone beyond or violated his instructions, is a question between him and his clients, in which the defendant has no concern and need not interest himself.

Right of attorney to control a case. — A party to an action may appear in his own proper person or by attorney, but he cannot do both. If he appears by attorney, he must be heard through him, and it is indispensable to the decorum of the

court, and the due and orderly conduct of a cause, that such attorney shall have the management and control of the action, and his acts go unquestioned by any one except the party whom he represents. So long as he remains attorney of record, the court cannot recognize any other as having the management of the case. If the party, for any cause, becomes dissatisfied with his attorney, the law points out a remedy. He may move the court for leave to change his attorney, as provided in section 10 of the act concerning attorneys and counselors. Until that has been done, the client cannot assume control of the case. While there is an attorney of record, no stipulation as to the conduct or disposal of the action should be entertained by the court unless the same is signed or assented to by such attorney: Section 9 of the act concerning attorneys and counselors. Such a rule is not only indispensable to the orderly conduct of a cause, but is likewise a safeguard to the client against the intrigues of his adversary. Moreover (without being understood as making any reference to the present case), it is proper to add, that to entirely ignore the attorney of record, and enter, without his consent, into secret negotiation with his client touching the management of his case, is unbecoming the dignity of the legal profession, and destructive of that courtesy which is due from one member to another.

The 148th section of the practice act does not affect the question under consideration. That section provides that an action may be dismissed by either party upon the written consent of the other; and we add, that where there is an attorney of record, such consent must come from him or be sanctioned by him.

Upon the question, whether the court ought to allow the plaintiffs to control the action at all, in view of their agreement with Gish, we express no opinion. We only say that if the defendant has secured a valid settlement of the matters involved in the case, he must avail himself of it in some other mode.

Order reversed.

RHODES, J., expressed no opinion.

RIGHT AND POWER OF ATTORNEY AND CLIENT, RESPECTIVELY, TO MAN-AGE ACTION. — The powers and authority of attorneys at law by virtue of a general retainer are fully considered in the note to *Clark v. Randall*, 76 Am. Dec. 256-265. An attorney at law regularly retained in a cause has very

large, if not exclusive, power and authority in the management and prosecution of the suit, in all matters that affect the remedy merely, and not the cause of action itself. He has implied authority to do all acts necessary and proper to the regular and orderly conduct of the case without consulting his client. The client is presumed to have authorized his attorney to do all such acts in the course of the proceedings as may, with the latter's superior knowledge of the law, seem necessary and proper, and the client has no right to control his attorney in the due and orderly conduct and management of the case: *Pierce v. Strickland*, 2 Story, 292; *Nightingale v. Oregon Cent. R'y Co.*, 2 Saw. 338; *Hart v. Spalding*, 1 Cal. 213; *Smith v. Polack*, 2 Id. 92; *Holmes v. Rogers*, 13 Id. 191; *Mott v. Foster*, 45 Id. 72; *Boston Tunnel Co. v. McKemie*, 67 Id. 485; *McConnell v. Brown*, 40 Ind. 384; *Jenney v. Delesdernier*, 20 Ma. 183; *Benson v. Carr*, 73 Id. 76; *Burgess v. Stevens*, 76 Id. 559; *Moulton v. Bowker*, 115 Mass. 36; S. C., 15 Am. Rep. 72; *Foster v. Willy*, 27 Mich. 244; *Levy v. Brown*, 56 Miss. 83; *McCann v. McLennan*, 3 Neb. 25; *Edgerton v. Brackett*, 11 N. H. 218; *Howe v. Lawrence*, 22 N. J. L. 99; *Anonymous*, 1 Wend. 106; *Chesman v. Merkle*, 3 Bosw. 402; *Clark v. Randall*, 9 Wis. 135; S. C., 76 Am. Dec. 252; *Latuck v. Pashersante*, 1 Salk. 86; *King v. Pinsoneault*, L. R. 6 P. C. App. Cas. 245; Weeks on Attorneys at Law, sec. 220. Gray, C. J., delivering the opinion of the court in *Moulton v. Bowker*, 115 Mass. 40, said: "An attorney at law has authority, by virtue of his employment as such, to do in behalf of his client all acts, in or out of court, necessary or incidental to the prosecution and management of the suit, and which affect the remedy only, and not the cause of action." And Mr. Justice Story, in the case of *Pierce v. Strickland*, 2 Story, 306, said: "My own opinion strongly is, that the attorney with us is, by implication, clothed with authority, in all cases of this sort, to do all the acts which are usual and proper to protect the interests of his client in any attachment as a part of his ordinary duty. It is for the interest of all clients that this authority should exist; for it would otherwise be impracticable in many cases, without great expense and delays, to do many acts which might be indispensable to the security of the clients."

Where, therefore, a party to an action has an attorney of record, a stipulation signed by the party in person, granting time to file a statement, will be disregarded: *Mott v. Foster*, 45 Cal. 72. So in *Nightingale v. Oregon Central R'y Co.*, 2 Saw. 338, it was held that neither the party nor his agent or attorney in fact has authority to sign a stipulation for a continuance, in a case where the party has an attorney of record. And in *King v. Pinsoneault*, L. R. 6 P. C. App. Cas. 245, it was decided that in Lower Canada an *avocat* can bind his client (until *désavoué*) by any proceeding in the cause, though taken without his client's authority, or even in defiance of his prohibition. In *Burgess v. Stevens*, 76 Me. 559, Stevens employed an attorney to foreclose his mortgage, and left with him the note and mortgage, it being understood between them that the foreclosure should be by publication. The attorney followed this method, but fearing it might prove ineffectual, he, in the absence of his client, and without his knowledge, brought a suit on the mortgage, and took judgment. It was held that the attorney in bringing the foreclosure suit acted within the scope of his authority, and the mortgage was estopped from repudiating that suit to the injury of the mortgagor. But although agreements made by attorneys as to the manner of conducting a cause will, in proper cases, be respected and enforced by the court, yet such agreements are not legal contracts, and are under the discretion and control of the court, which will not enforce an agreement wanting in mutu-

ality, by which an attorney, without consulting his client, has waived the latter's substantial legal rights: *Howe v. Lawrence*, 22 N. J. L. 99. And in Indiana, where the statute provides that an attorney has authority to bind his client in an action or special proceeding, by his agreement filed with the clerk, or entered upon the minutes of the court, and not otherwise, it was held that a verbal agreement made by an attorney with the opposite counsel that a bill of exceptions might be filed after the sixty days allowed by the court within which to file it, and that when filed it should be dated as of some day within the sixty days, was not binding upon the client: *Goben v. Goldsberry*, 72 Ind. 44. But when a client, although he has appeared by attorney, enters into a stipulation with a party discontinuing the action, he cannot afterwards be heard to object to such stipulation so signed by him, on the ground that having appeared by attorney, the latter only was authorized to sign a stipulation for a discontinuance: *McBratney v. Rome etc. R. R. Co.*, 87 N. Y. 467.

POWER OF CLIENT OVER ACTION.—As a general rule, the parties to an action may settle it without the intervention, knowledge, or consent of their attorneys. As was said by Parke, B., in *Jordan v. Hunt*, 3 Dowl. Pr. 666, "it is quite competent to parties to settle actions behind the backs of attorneys, for it is the client's action, and not the attorney's": *Jones v. Bonser*, 2 Ex. 230; *Nelson v. Wilson*, 6 Bing. 668; *Francis v. Webb*, 7 Com. B. 731; *Hawkins v. Loyless*, 39 Ga. 5; *Green v. Southern Express Co.*, 39 Id. 20; *Coughlin v. New York Central R. R. Co.*, 71 N. Y. 443; *Yoakley v. Hawley*, 5 Lea, 670; *Hooper v. Welch*, 43 Vt. 169; S. C., 5 Am. Rep. 267. In *Yoakley v. Hawley*, *supra*, it was decided that an attorney has no right to object to any disposition of the case which his client sees fit to make; that a party has always a right to control his case, and the absolute right to revoke the authority of his attorney to prosecute or defend in his name; that the attorney cannot prosecute or defend in the name of the client without the latter's consent; and that the fact that the attorney may be interested in the continuation of the prosecution or defense of the action, in order to secure his fees, does not give him the right to control the case. Where a case is settled by the parties thereto without the consent or intervention of the attorneys, in good faith and without any object to cheat the attorney out of his fees, there is no doubt of the right and power of the client to make a settlement, even though he may not have paid his attorney: *Hawkins v. Loyless*, 39 Ga. 5; *Roberts v. Doty*, 31 Hun, 128; *Pearl v. Robitcheck*, 2 Daly, 138; *Marr v. Smith*, 4 Barn. & Ald. 466. An attorney has no such lien in a cause before judgment as will prevent his client from settling the action without his consent or knowledge: *Simmons v. Almy*, 103 Mass. 33; *Parker v. Blighton*, 32 Mich. 266. And a party having a cause of action in its nature not assignable cannot by any agreement before judgment give his attorney any such interest therein as will defeat a settlement of the suit by the parties themselves: *Coughlin v. New York Central R. R. Co.*, 71 N. Y. 443. Where a plaintiff compromises the debt with the defendant, and discharges an execution without providing for his attorney's costs, the court will not permit the attorney of his own motion to sue out another execution for the costs: *Graves v. Eades*, 5 Taunt. 429. An attorney's lien on a judgment being merely a claim to the equitable interference of the court to have the judgment held as a security for his costs, he has no authority over the execution of a writ of *ca. ex.*, so as to carry it into effect against the order of the plaintiff, even though there should be collusion between the parties to deprive him of his lien: *Barter v. St. Quentin*, 12 Mees. & W. 441. If the plaintiff compromises with the defendant before

the plaintiff's attorney has been paid, the court will not oblige the defendant to pay him, unless he previously gave notice to the defendant not to settle with the plaintiff till his bill should be paid; *Welsh v. Hols*, Doug. 238; *Pinder v. Morris*, 3 Caines, 165.

RIGHT OF CLIENT TO CHANGE HIS ATTORNEY. — A party to an action has a general right to change his attorney at any stage of the proceeding that he pleases, and for any cause that seems to him proper. And if he pays his attorney for the services rendered up to the date of the change, the client is not bound to give to the court any reason for the desire on his part to have a different attorney substituted for the one who has hitherto conducted his case: *Weeks on Attorneys*, sec. 250; *In re Paschal*, 10 Wall. 483; *Haslett v. Gill*, 5 Robt. 611; *Wolf v. Trochelman*, 5 Id. 611; *Ogden v. Devlin*, 45 N. Y. Super. Ct. 181; *Trust v. Repoor*, 15 How. Pr. 570; *Board of Supervisors v. Broadhead*, 44 Id. 411; *Arrington v. Sneed*, 18 Tex. 135; *Merrewether v. Mellish*, 13 Ves. 161; *Twort v. Dayrell*, 13 Id. 195. In England, an attorney cannot be changed without an order of court: *Anonymous*, 7 Mod. 50; *Anonymous*, 12 Id. 440; *Perry v. Fisher*, 6 East, 549; *Macpherson v. Rorison*, Doug. 217; *Powell v. Little*, 1 W. Black. 8; *May v. Pike*, 4 Mees. & W. 197; *Twort v. Dayrell*, 13 Ves. 195; *Ginders v. Moore*, 1 Barn. & C. 654. The same rule is followed in some of the states in this country: *Mumford v. Murray*, Hopk. Ch. 369; *Stevenson v. Stevenson*, 3 Edw. Ch. 340; *Sloo v. Law*, 4 Blatchf. 268; *Walton v. Drewry*, Phill. (N. C.) 98. And it seems that a client has no right to an order changing his attorney until the just claims of the attorney are discharged or secured: *Witt v. Ames*, 11 Week. Rep. 751; *Langley v. Stapleton*, Barnes, 40; *Parker v. Williamsburgh*, 13 How. Pr. 250; *Hoffman v. Van Nostrand*, 14 Abb. Pr. 336. But if the attorney refuses to go on with his client's cause, or if he be guilty of negligence or misconduct in the conduct of the case, the court will make an order changing him, although his fees have not been paid or secured: *Walsh v. Shumway*, 65 Ill. 471; *In the Matter of H.*, 93 N. Y. 381; *Sloo v. Law*, 4 Blatchf. 270; *Colegrave v. Manley*, Turn. & R. 400; *In re Faithfull*, L. R. 6 Eq. 325; *Robins v. Goldingham*, 13 Id. 440. An attorney cannot refuse to go on with an action because his client fails to supply him with money, or by reason of any other difficulty, without running the risk of losing the benefit of the relation of an attorney: *In the Matter of H.*, 93 N. Y. 381; *In re Faithfull*, L. R. 6 Eq. 325; *Robins v. Goldingham*, 13 Id. 440. After judgment has been entered in an action, the client may employ a new attorney to take out execution without any formal substitution: *Hussey v. Welby*, Sayers, 218; *Tipping v. Johnson*, 2 Bos. & P. 357; *Thorpe v. Fowler*, 5 Cow. 446; *Egan v. Rooney*, 38 How. Pr. 121.

REMEDY OF CLIENT TO PREVENT ATTORNEY FROM PURSUING COURSE PREJUDICIAL TO HIM. — The court has power by summary proceedings to compel an attorney or solicitor to deal justly with his client. This power springs from the right and duty of the court to exercise needful control over the conduct of its own officers: *In the Matter of Bleakley*, 5 Paige, 311; *Kuhne v. Daily*, 23 Hun, 282; *In the Matter of Finkle*, 6 Daly, 111; *Ex parte Edwards*, L. R. 8 Q. B. D. 262; *Bowling Green Savings Bank v. Todd*, 52 N. Y. 489. In the case last cited, Peckham, J., in delivering the opinion of the court, said: "The practice in this state has been uniform to allow an attachment where the attorney retains money in his hands that justly belongs to his client." And in *Ex parte Edwards*, *supra*, it was decided that the court would exercise its summary jurisdiction to compel a solicitor to pay over money of his client which he had no right to retain, even where no fraud was imputed to him. An attorney or solicitor will be restrained from giving

up his client and going over and acting for the opposite party in any suits between them: *Cholmondeley v. Clinton*, 19 Ves. 261. In *Bricheno v. Thorp*, Jacob, 300, it was held that a clerk to a solicitor commencing practice for himself would not be restrained from acting as solicitor for parties against whom his master was employed, upon a mere general allegation of his having, in his former service, acquired information likely to be prejudicial to the clients of his master. And in *Johnson v. Marriott*, 2 Ex. 183, it was decided that where an attorney has been employed in a cause, and is afterwards discharged by his client, not on the ground of misconduct, the court will not restrain him from acting for the opposite party, unless it clearly appears that he has obtained information in his former character which it would be prejudicial to the cause of his former client to communicate.

THE PRINCIPAL CASE IS DISTINGUISHED IN *Willson v. Cleveland*, 30 Cal. 200.

DERRINGER v. PLATE.

[29 CALIFORNIA, 292.]

RIGHT OF PROPERTY IN TRADE-MARK IS RECOGNIZED BY COMMON LAW, and does not in any manner depend for its inceptive existence or support upon statutory law, although its exercise may be limited or controlled by statute.

RIGHT OF PROPERTY IN TRADE-MARK IS NOT LIMITED IN ITS ENJOYMENT by territorial bounds, but may be asserted and maintained wherever the common law affords remedies for wrongs, subject only to such statutory regulations as may be properly made concerning the use and enjoyment of other property.

CALIFORNIA ACT OF 1863 CONCERNING TRADE-MARKS DOES NOT TAKE AWAY COMMON-LAW REMEDY for the protection thereof from those who do not register their trade-mark according to the provisions of the act.

BILL for an injunction to restrain the defendant from pirating the plaintiff's trade-mark. The plaintiff alleged that he was a resident of Philadelphia, where upwards of thirty years before he invented a pistol known as Derringer's pistol, for which he adopted as a trade-mark the words "Derringer, Philadel.," which trade-mark he had ever since used and had stamped on the breech of all pistols made and sold by him; and that the defendant, since 1858, had been engaged in the manufacture of pistols at San Francisco, similar to plaintiff's, on the breech of which he had stamped the plaintiff's trade-mark, etc. The defendant had judgment on the demurrer, and the plaintiff appealed. The other facts are stated in the opinion.

Nathaniel Holland, for the appellant.

Hoge and Wilson, for the respondent.

By Court, RHODES, J. This is a suit in equity for an injunction to restrain the defendant from pirating the plaintiff's trade-mark, and for the recovery of damages for a violation of the plaintiff's trade-mark property.

The defendant's demurrer to the complaint was sustained, and the only question presented on the appeal is, whether the statute of 1863, concerning trade-marks, repealed or abrogated the remedies afforded by the common law in trade-mark cases. The plaintiff does not allege a compliance with the provisions of the statute. He contends that the remedies given by the statute are cumulative to those which a party was entitled to at common law, and the defendant insists that the statute forms a "complete scheme" in respect to trade-marks, and thereby repeals the common-law rules relating to the same subject-matter.

Right to a trade-mark at common law.—Any name, symbol, letter, figure, or device adopted by the persons manufacturing or selling goods, and used and put upon such goods to distinguish them from those manufactured or sold by others, and employed so often and for such a length of time as to raise the presumption that the public would know that it was used to indicate ownership of the goods in the person manufacturing or selling them, constitutes his trade-mark. His right to the trade-mark accrues to him from its adoption and use for the purpose of designating the particular goods he manufactures or sells, and although it has no value except when so employed, and indeed has no separate abstract existence, but is appurtenant to the goods designated, yet the trade-mark is property, and the owner's right of property in it is as complete as that which he possesses in the goods to which he attaches it, and the law protects him in the enjoyment of the one as fully as of the other. In order that the claimant of the trade-mark may primarily acquire the right of property in it, it must have been originally adopted and used by him,—that is, the assumed name or designation must not be one that was then in actual use by others: Upton's Trade-marks, 46; and such adoption and use confer upon him the right of property in the trade-mark. It was at one time thought that no man could acquire a right to a particular trade-mark: *Blanchard v. Hill*, 2 Atk. 484; but as the true interests of manufactures and commerce were more fully developed and appreciated, the right of property in trade-marks was recognized, and the doctrine has been uniform for many years, that

the manufacturer or merchant does possess an exclusive property in the trade-mark adopted and used by him. The right of property does not in any manner depend for its inceptive existence or support upon statutory law, though its enjoyment may be better secured and guarded, and infringements upon the rights of the proprietor may be more effectually prevented or redressed, by the aid of the statute than at common law. Its exercise may be limited or controlled by statute, as in case of other property, but like the title to the good-will of a trade, which it in some respects resembles, the right of property in a trade-mark accrues without the aid of the statute. The right is not limited in its enjoyment by territorial bounds, but subject only to such statutory regulations as may be properly made concerning the use and enjoyment of other property, or the evidences of title to the same; the proprietor may assert and maintain his property right wherever the common law affords remedies for wrongs. The manufacturer at Philadelphia who has adopted and uses a trade-mark has the same right of property in it at New York or San Francisco that he has at his place of manufacture. It was held in *Taylor v. Carpenter*, 3 Story, 450, and *Collins Company v. Brown*, 3 Kay & J. 423, that an alien was entitled to be protected in the ownership of this character of property equally with the citizen.

Act of 1863 concerning trade-marks.—Does not the act of 1863, instead of constituting a “complete scheme” for the acquisition and protection of property in trade-marks, rather proceed on the theory that this species of property did exist, and might thereafter be acquired, under the rules of the common law, and provide that those securing such right according to the provisions of the act might have a further or more efficient protection than those who failed to avail themselves of the statute, and relied upon the common-law remedies?

The first section, so far as it is applicable to a case of the nature of the present one, provides that when a person who has complied with section 2 of this act uses any peculiar name or other trade-mark in any manner attached to or connected with any article manufactured by him, to designate it as such, it shall be unlawful for any other person, without the consent of the former, to use said trade-mark or name for the purpose of representing any article to have been manufactured “by the person rightfully using such trade-mark or name.” The second section provides that “any person wishing to secure

the exclusive use of any such trade-mark or name, under the provisions of this act, shall file his claim to the same, and a copy or description of such trade-mark or name, with the secretary of state." It is provided by section 3 that the secretary of state shall keep a record of trade-marks and names filed with him; and by section 4 it is provided that persons violating the provisions of section 1 shall be deemed guilty of a misdemeanor punishable by fine and imprisonment, and shall be liable to an action for damages.

Section 5 declares the counterfeiting of such trade-mark or name a misdemeanor, and provides for its punishment. Section 6 prohibits the use of such trade-mark or name for the purpose of disposing of any other article than that to which it was originally attached, with intent to deceive or defraud, and provides for its punishment as a misdemeanor; and section 7 provides for the punishment of those who aid or abet the commission of the offenses declared in the act to be misdemeanors. Up to this point the act is dealing with trade-marks filed with the secretary of state, and granting protection to the rights of property therein of those who avail themselves of the provisions of the act, and no reference is made to the right of property in or the use of trade-marks by those who before the taking effect of the act, whether residing within or without the state, had acquired a right to their use. Sections 8 and 9, however, do provide for those cases; and to make it clear that the legislature did not even attempt to divest persons of existing rights of property, nor perhaps to preclude them from acquiring title as they had formerly done, by adoption and use, it is provided that the act "shall not be so construed as to permit any person to file, without authority from the owner, any trade-mark or name owned or previously used by another person," thus recognizing not only existing rights of property, but also the rules of the common law under which persons become the owners of trade-marks without having the same registered by the secretary of state. It is nowhere declared, either directly or indirectly, that property in a trade-mark can be acquired only in the mode provided by the act; but on the contrary, it appears by collating sections 1 and 10, that no one is permitted to file his claim with the secretary of state unless he is the exclusive owner of the trade-mark.

Section 9 is an affirmance of the common law, and declares that the person who has first adopted and used a trade-mark,

"whether within or beyond the limits of this state, shall be considered its original owner, with full right of property, and entitled to the same protection by suits at law," as in the case of other personal property.

The defendant's construction of the section, which would make it read, that the person who first adopts and uses a trade-mark shall be considered the original owner, and as such entitled to protection, etc., "provided he files his claim according to the provisions of this act," cannot be supported. With that construction it amounts to a useless repetition of previous provisions, for the act had already constituted the person filing his claim to his trade-mark its owner, by giving him its exclusive use, and protecting him against counterfeiting and pirating by means of actions at law and criminal prosecutions; and in a subsequent part of the act—section 11—he is granted the aid of an injunction. It would be scarcely reasonable—though it might be highly beneficial to the library fund—to hold that the legislature intended that not only those who wished to receive the benefit of the more effective protection afforded by the act must file their claim with the secretary of state, and pay the fees, but that the same must be done by all the merchants and manufacturers, not only in this state, but in all of the states, and in every country that maintains commercial relations with California, if they desired to be considered in this state the owners of their trade-marks, and to receive the protection accorded by law to the owners of other personal property.

Common-law remedies for invasion of trade-marks.—At common law, the remedies for invasions of trade-mark property were an action at law for the recovery of damages, and an injunction, in which case pecuniary compensation might be incidentally awarded. Several of the states have, by statute, added a criminal prosecution as a further remedy or protection. The remedies at common law are still left by our statute in those cases where the trade-mark has not been registered according to the act, for not only is the right of property recognized and affirmed as it existed at common law, and the common-law remedies are not taken away, but the protection afforded by suits at law and bills for injunctions is expressly conceded. Those provisions add nothing to the rights previously possessed by the owner of the trade-mark, and are only in affirmance of the common law. But he does not have the aid of a criminal prosecution for his protection.

On the other hand, those owning trade-marks, who have filed their claims and affidavits, and paid the fees, have the protection accorded to the other class of cases, and have also that arising from the criminal prosecutions, with penalties, upon conviction, of more than usual severity.

We do not fully agree with counsel for either party in his construction of the act in respect to its relation to and effect upon the common-law remedies. The remedies provided by the act, at least those applicable to registered trade-marks, are not cumulative to those possessed at common law, but in that respect provision is made by the act for a new case; nor do we think the act forms a "complete scheme" of itself, in the sense that counsel regards it, as requiring all trade-marks to be registered under the act to entitle them to protection; though it may be regarded as a "complete scheme" in the respect that it grants certain remedies in cases of registered trade-marks, and expressly reserves to the owners in other cases the usual remedies enjoyed at common law.

Judgment reversed, and the cause remanded, with directions to the court below to overrule the demurrer.

TRADE-MARKS: See *Woodward v. Lamar*, 82 Am. Dec. 751, note 753; *Barrows v. Knight*, 78 Id. 452, note 454, where other cases are collected. The right to the exclusive use of a trade-mark, where statutes exist regulating and protecting it, does not depend upon such statutes: *Shaver v. Shaver*, 54 Iowa, 209, citing the principal case. In *Whittier v. Dietz*, 66 Cal. 78, the supreme court of California decided that no one, since the codes of that state went into effect, can acquire the exclusive use of a name or trade-mark except by filing it for record with the secretary of state. McKinstry, J., who delivered the opinion of the court, said that the principal case "was decided before the codes, and turned in part upon the point that the act of 1863 provided that the counterfeiting of a trade-mark should be a misdemeanor, punishable as such, and thus only creating a new penalty for a violation of the trade-mark provided for in the statute; and principally upon the fact that the act of 1863 contained sections which clearly indicated the legislature did not intend to divest of existing rights in trade-marks those who had acquired the right at common law before the taking effect of the act."

CASES
IN THE
SUPREME COURT OF ERRORS
OF
CONNECTICUT.

**DAILY v. NEW YORK AND NEW HAVEN RAILROAD
COMPANY.**

[32 CONNECTICUT, 356.]

IN CIVIL SUIT, DYING DECLARATIONS OF PERSON FATALLY INJURED by the act of another, as to the facts attending the injury, are not admissible in evidence against the defendant. Such declarations are only admissible in criminal cases, where the death of the deceased is the subject of the charge, and the circumstances of the death the subject-matter of the declaration.

DEFENDANT MAY INTRODUCE EVIDENCE TO PROVE CONTRIBUTORY NEGLIGENCE OF PLAINTIFF, for the purpose of reducing the damages to a nominal sum, upon a hearing in damages, after the overruling of the defendant's demurrer to a declaration charging an injury by his negligence.

ACTION on the case by the plaintiff, as administrator of Michael Daily, deceased, for an injury to the latter through the negligence of the defendants. After overruling the defendants' demurrer to the declaration, the court heard the case in damages. Upon the hearing the court found that the deceased was struck by the defendants' locomotive while he was walking on the track of the railroad, through a cut, after dark, and that he died a few hours after; that the defendants were culpably negligent in the management of their train, but that the deceased was chargeable with gross and culpable negligence, which materially contributed to the injury. The court assessed nominal damages. The plaintiff offered to prove the dying declarations of the deceased, for the purpose of showing the circumstances under which he was struck by the locomotive, but the court rejected the evidence on the objection of the

defendants. The defendants offered evidence to show that the deceased was guilty of such negligence as materially and directly contributed to produce the injury. The plaintiff claimed that the defendants by their demurrer admitted a cause of action, and that the plaintiff was not guilty of such negligence, and that it was not competent for the defendants to prove, nor for the court to find, that the plaintiff was guilty of such negligence; but the court overruled this claim of the plaintiff. The plaintiff moved for a new trial.

Doolittle, in support of the motion.

Blackman and Watrous, contra.

By Court, HINMAN, C. J. Two questions are raised by the plaintiff upon this record: 1. That the court erred in rejecting certain declarations of the deceased, made after he received the injury for which the action is brought, and while he was under a sense of impending dissolution; and 2. That the court erred in permitting the defendants to prove gross negligence in the deceased which materially contributed to the injury. The superior court was most clearly correct upon both of these questions.

Dying declarations are only admissible in criminal cases, where the death of the deceased is the subject of the charge, and the circumstances of the death the subject-matter of the declaration. There are very few cases anywhere in which this rule has been departed from, and we have always acted upon the well-settled law of England on the subject: *King v. Mead*, 2 Barn. & C. 605; *Wilson v. Boerem*, 15 Johns. 286; *Rex v. Lloyd*, 4 Car. & P. 233.

In regard to proof that the negligence of the deceased contributed to produce his injury, the case is not distinguishable in principle from that of *Havens v. Hartford and New Haven R. R. Co.*, 28 Conn. 69, in which this subject underwent a very thorough examination. That case was like this, a hearing in damages after the defendants' demurrer had been overruled, and proof was introduced to show that the wrongful acts of the plaintiff himself contributed to his injury.

We do not advise a new trial.

In this opinion the other judges concurred.

DYING DECLARATIONS, WHEN ADMISSIBLE: See *Commonwealth v. Cooper*, 81 Am. Dec. 762, note 764, where other cases are collected. Dying declarations are not *per se* admissible in civil cases: *Barfield v. Britt*, 62 Id. 190, note 194, where other cases are collected.

CONTRIBUTORY NEGLIGENCE SUFFICIENT TO PREVENT RECOVERY: See *Todd v. Old Colony etc. R. R. Co.*, 83 Am. Dec. 679, note 681; *Heil v. Glandine*, 82 Id. 537, note 540, where other cases are collected. The defendant may, on a hearing in damages, show want of ordinary care on the part of the deceased, and the exercise of due care on its own part, to reduce the damages to the lowest point fixed by the statute: *Cary v. Day*, 36 Conn. 157, citing the principal case.

COBB v. CHARTER.

[32 CONNECTICUT, 358.]

PAYMENT OF MONEY IS COMPULSORY WHEN MADE THROUGH NECESSITY to obtain possession of goods illegally withheld, where the detention is fraught with great immediate hardship or irreparable injury, and the money paid may be recovered back in an action of *assumpsit*.

WHERE PERSON DETAINS ANOTHER'S CHEST OF TOOLS AND IMPLEMENTS OF TRADE, necessary for upholding life, until they are redeemed by the payment of money to which he had no shadow of right, the money so paid may be recovered back without making any demand therefor.

WHERE PERSON HAVING POSSESSION OF ANOTHER'S CHEST OF TOOLS REFUSES TO DELIVER THEM to the owner on demand, except upon his paying, without any obligation, the debt of another person, and the owner thereupon leaves money with a third person to be paid when the chest should be sent to the owner, which money is accordingly paid by such third person after the goods are so sent, there is a sufficient demand for the chest to maintain an action for the recovery back of the money so paid.

WHERE FIRST COUNT OF DECLARATION FOR RECOVERY BACK OF MONEY ILLEGALLY EXTORTED IS SUFFICIENT, and a second count, inartificially drawn and containing superfluous averments, but fully stating the circumstances out of which the law implies a promise by the defendant to pay the plaintiff's demand, is added, the defect in form is not sufficient to invalidate the declaration.

GENERAL *assumpsit* for money had and received, with a second count alleging that a chest of tools belonging to the plaintiff was wrongfully detained by the defendant, though demanded by the plaintiff, and that the defendant refused to deliver it up until the plaintiff should pay him twenty-five dollars; that plaintiff sustained great damage by reason of the detention; and that he afterwards paid the twenty-five dollars to recover the chest;—all to his damage in the sum of fifty dollars. On the trial in the superior court, to which the action was appealed from the justices' court, it appeared that the claim for which the defendant demanded payment before he would deliver up the chest was a bill which he held against the plaintiff's son. The jury found for the plaintiff, and the defendant moved for a new trial. The other facts appear from the opinion of the court.

Doolittle, in support of the motion.

C. Ives and Wood, contra.

By Court, McCURDY, J. In this case the honesty of the plaintiff's claim and the justice of the verdict are undenied. His tools and implements of trade necessary for upholding life were detained from him by the defendant until they were redeemed by the payment of money to which the defendant had no shadow of right. The defense is strictly technical throughout.

The first and principal ground is, that the payment was voluntary. It is undoubtedly a general rule that money paid voluntarily, without fraud and with a full knowledge of all the facts, cannot be recovered back by the party who has so paid it. He is bound to resist an unjust demand in the first instance. To pay when he could successfully defend against it, and then sue for the money, is a species of frivolity, involving also a circuity of action, which the law does not encourage. The rule is founded on the presumption that defending in such a suit would afford adequate redress. There are many exceptions to it, or rather many instances in which the payments, having been made under the pressure of an enforced emergency, are not considered voluntary, but compulsory in law. Among the more common of these cases are illegal exactions of tolls, fees of office, taxes, revenue duties, etc., under an alleged authority of law. An early case of this kind occurs in our own reports, *Carey v. Prentice*, 1 Root, 91, where the plaintiff's vessel was detained by the defendant, commander of the fort at New London, because the plaintiff had not given bond according to law, and the plaintiff paid him \$145 to let him go to sea without giving bond. The money was recovered back. In other cases, where the money is not extorted in this manner, it is not always easy to distinguish between voluntary and compulsory payments, and the decisions are apparently conflicting. But it is safe to say that wherever money is paid through a necessity to obtain possession of goods illegally withheld, and where the detention is fraught with great immediate hardship or irreparable injury, the payment is held to be compulsory. It is said in 1 Swift's Digest, 407, that "a payment made to procure the possession of goods which another unjustly detains, or to prevent goods which have been distrained from being sold, is not voluntary": *Shaw v. Woodcock*, 7 Barn. & C. 73; *Hills v. Street*, 5 Bing. 37. In the first

volume of Espinasse's *Nisi Prius*, pages 14 and 192, *assumpsit* is said to lie generally "to recover back money obtained from any one by extortion, imposition, oppression, or taking an undue advantage of the party's situation": *Moses v. Macferlan*, 2 Burr. 1012. In *Oates v. Hudson*, 5 Eng. L. & Eq. 469, the plaintiff paid money to an attorney to obtain his title deeds, saying at the time to the defendant, "you shall hear of this again," and the action of *assumpsit* was sustained: See also *Cartwright v. Rowley*, 2 Esp. 723. In *Astley v. Reynolds*, 2 Strange, 915, money unjustly exacted to obtain plate which had been pawned was allowed to be recovered back. In *Maxwell v. Griswold*, 10 How. 242, the principle is laid down that "in order to constitute an involuntary payment so that the money may be recovered back, it need not be made under actual violence or physical duress; it is enough that the party pays reluctantly in consequence of an illegal demand, and without being able to regain possession of his property except by submitting to the payment." Among other authorities on this subject are *Sasportas v. Jennings*, 1 Bay, 470; *Collins v. Westbury*, 2 Id. 211 [1 Am. Dec. 643]; *Alston v. Durant*, 2 Strob. 257 [19 Am. Dec. 596]; *Chase v. Dwinal*, 7 Me. 134 [20 Am. Dec. 352]; *Fleetwood v. City of New York*, 2 Sand. 475; *Harmony v. Bingham*, 12 N. Y. 99 [62 Am. Dec. 142]; *Shaw v. Woodcock*, 9 Dowl. & R. 889; S. C., 7 Barn. & C. 73; *Bates v. New York Ins. Co.*, 3 Johns. Cas. 238.

The circumstances of the present case furnish a striking illustration of the necessity of the principle which we sustain. The plaintiff was a mechanic. His chest of tools, which are held by statute sacred even from the touch of a creditor, were seized by the defendant. He refused to deliver them to the owner on demand except upon his paying, without the slightest obligation, the debt of another person. The plaintiff was thus deprived of the means of his support. Thereupon he left the money with Stratton, to be paid to the defendant when the chest should be sent. Stratton so informed the defendant, who at once sent the chest and then received the money.

In view of such extortion, oppression, and taking an undue advantage of the plaintiff's situation, it seems somewhat bold in the defendant to come into a court of justice and assert that the payment was voluntary.

A question is raised as to the sufficiency of the demand. It is difficult to see what further was necessary beyond what was done. The demand for the chest was both general and special.

In relation to the money illegally extorted, it stands upon the same ground as though it had been taken from the plaintiff's pocket.

There remains another technical question, growing out of the form of the declaration. The motion in arrest and motion in error turn upon the same point, a supposed misjoinder of the counts.

The first count is the general one, and is undoubtedly proper and sufficient. The second count contains a particular relation of the facts upon which the plaintiff seeks to recover. It is inartificially drawn and contains superfluous averments, but substantially it is a full statement of the circumstances out of which the law implies a promise of the defendant to pay the plaintiff's demand, for the recovery of which, as we have seen, *assumpsit* is the appropriate action. The elements of the plaintiff's right are well set out, and the defect is one of form. The result of the trial is confessedly just. The defendant has experienced no injury from the looseness of the count, and we see no reason to disturb the verdict.

In this opinion the other judges concurred.

ASSUMPSIT FOR MONEY HAD AND RECEIVED LIES whenever the defendant has money to which the plaintiff is, in equity and good conscience, entitled: *Lawson's Ex'r v. Lawson*, 80 Am. Dec. 702, note 705, where other cases are collected; *Bailey v. Goshen*, 32 Conn. 548; S. C., *post*, p. 193; *Post v. Clark*, 35 Id. 341, both citing the principal case. Also to recover back money paid to procure a release of property which the defendant illegally detained: *Carver v. Rutherford*, 106 Mass. 12, citing the principal case.

RIDDLE v. STEVENS.

[32 CONNECTICUT, 578.]

IN CONNECTICUT, INDORSEMENT IN BLANK OF EITHER NEGOTIABLE OR NON-NEGOTIABLE NOTE BY ONE NOT PARTY TO IT implies a warranty that the note when due will, by the use of due diligence, be collectible. But such an indorsement is only *prima facie* evidence of what the contract was between such an indorser and the holder of the note, and will yield to proof of the real character of the contract. Notes so indorsed have none of the sanctity of ordinary negotiable paper, and any one taking them is put upon inquiry as to the real nature of the contract.

WHERE BLANK NOTE IS INDORSED BY ONE WHO SUPPOSED THAT HIS NAME WOULD BE INSERTED AS PAYEE, upon an understanding with the maker that it should be used for a particular purpose, and the maker, without the indorser's knowledge, fills it up by inserting the name of another person as payee, who thereupon takes the note, without any

knowledge of the facts, for a valuable consideration, but for a different purpose from that intended by the indorser, such payee cannot recover thereon against the indorser.

ASSUMPSIT. On the trial, the plaintiff offered in evidence the following note:—

“\$218.59.

NEW YORK, June 19, 1861.

“Three months after date, I promise to pay to the order of E. Riddle, two hundred and eighteen and $\frac{59}{100}$ dollars, at my office. Value received.

WM. L. McDONALD.”

Indorsed as follows:—

“H. STEVENS & Co.,

“EDWARD RIDDLE.”

Harry Stevens, one of the defendants, testified that he wrote their partnership name by way of indorsement in blank upon the note at the same time that he in the same manner indorsed sundry other notes payable to their own order, which had been discounted and were held for collection by the Elm City Bank in New Haven, and that he supposed that this note was one of that class, and that he had no knowledge personally of the plaintiff, or that this note belonged to him, or that it was to be filled up payable to his order, nor did he know that this was done until they received from the plaintiff a letter informing them of the dishonor of the note; that neither he nor his firm intended to indorse a note to or for the benefit of the plaintiff, and that it was done by accident and mistake and without consideration. The jury returned a verdict for the defendants, and the plaintiff moved for a new trial for error in the charge of the court. The other facts are stated in the opinion.

W. Cothren, in support of the motion.

Kellogg, *contra*.

By Court, DUTTON, J. This case has been presented to us as if the main question on the record was, whether a blank negotiable note which has been indorsed in blank by a person for one purpose can be filled up by the maker without the consent of the indorser, by inserting the name of another person as payee, to whose order it is made payable, and passed off to such payee for another purpose, so as to make the indorser liable to such payee. An examination of the record will show that no such question is fairly presented. But assuming that it is, a majority of the court are inclined to the opinion that the

payee under such circumstances, although ignorant of the purpose for which the indorsement was made, could not recover against the indorser. It is unnecessary to inquire what would be the legal effect elsewhere of the indorsement of a negotiable note already filled up by one who is not a party to it. In this state, after numerous decisions, some of which cannot be easily reconciled with others, it is settled law that an indorsement by one who is not a party to it, either of a negotiable or non-negotiable note, implies a warranty that the note when due will, by the use of due diligence, be collectible: *Lafin v. Pomeroy*, 11 Conn. 440; *Castle v. Candee*, 16 Id. 223.

It is equally well settled that such an indorsement is only *prima facie* evidence of what the contract was between such an indorser and the holder of the note. It would yield to proof of what the real contract was, if it was of a different character. Proof is admissible even to show that the indorsement imposed no legal liability, but was put on merely for purposes of collection. So it is admissible to show that it was a guaranty, or that it imposed any other liability. An examination of the cases will also prove that the rule in this state is no part of the law merchant. Paper so indorsed has none of the sanctity that is attached to negotiable paper as such. The indorsement is of the nature of a power of attorney, authorizing the holder of the paper, if there is no agreement to limit his authority, to write over the name the agreement which the law holds such an indorsement to imply. Some of our judges have lamented the flexibility of the rule, and have regretted that the meaning of such an indorsement was not absolutely fixed. This only shows that the rule is too well established to be shaken.

We are now prepared to see what authority is given by the indorsement of a blank negotiable note. That it would not give the holder any actual authority to make use of it contrary to the intention of the indorser is plain. But it is insisted that a stranger has a right to take it for granted that the indorsement was made after the note was filled up; and that there is nothing to put him on his guard or to lead him to inquire for what purpose the indorsement was made.

There can be no doubt that a blank signature on a piece of paper authorizes the holder of it to write certain contracts over it. In *Montague v. Perkins*, 22 Eng. L. & Eq. 516, the court held that the signer of a blank note which was stamped would be considered as authorizing the holder to fill up the note with

any amount and for any time which the stamp would authorize. This shows at once the implied authority and the limitation. It could not be contended that a mere signature of a name on the back of a blank note would authorize the holder to write over it a warranty of a horse or a receipt in full of all demands. The authority depends in a great measure upon what use it is customary to make of such signatures. In *Mahaiwe Bank v. Douglass*, 31 Conn. 170, the defendant indorsed a blank bill of exchange, from which the holder, who had previously signed it as drawer, erased most of the formal part, and then wrote over his own name a negotiable note payable to the defendant's order, and got it discounted as an indorsed negotiable note at the Mahaiwe Bank, which was the plaintiff in the case, and this court held that the bank was bound at its own risk to scrutinize it, and to ascertain whether the defendant authorized such a change. There was enough, it was decided, to put the bank on its guard, and if it trusted to the representations of the holder it was at its own risk.

When a negotiable note with the blank indorsement of a person who is not a party to it is presented to a man to advance money upon, or receive for other purposes, he will discover at once that the indorsement is an unusual one, and not in the ordinary course of business. The obligation of the indorser which he is called upon to take as security is of a peculiar character. The inquiry would at once suggest itself, Why was such an indorsement made upon such a note? It is apparently incompatible with the nature of such an instrument. For this reason the courts in the state of New York will not admit that there can be but one kind of indorsement of negotiable paper. Mr. Abbott, in his *New York Digest* (vol. 1, p. 440, note), after a thorough examination of the numerous decisions which had been made in that state, comes to the conclusion that the rule in that state is that an indorsement of a negotiable note by one who is not a party to it implies a contract as indorser only, and that he could be sued only as indorser. We have seen that a different rule prevails here, but it shows how incongruous any other indorsement than one by a party to a negotiable note seems to an observer in a state where commercial paper prevails. Such an indorsement is calculated to create embarrassment, and to render paper less available as negotiable paper.

For these reasons a majority of the court are inclined to think that such an indorsement would be sufficient to put the

payee or person to whom it is offered on his guard, and require of him, before he relies upon it, to make inquiry.

Where an instrument is thus diverted from its lawful purpose, one of two parties must suffer loss. The question is, On whom should the loss properly fall? The indorser would have no reason for believing that the note would be filled out in any other way than the usual one of inserting his name as payee. He would not, therefore, be chargeable with a want of due care. The person who should take such a note, relying on such an indorsement, would be chargeable with some degree of negligence. There would be enough to excite his suspicion that all was not right, and lead him to make inquiry. We are inclined, therefore, to think that between him and the indorser the loss should fall upon him.

But, as we have already intimated, we do not find this question on the record. The declaration contains two counts, one on the indorsement of a negotiable note in the usual way, the other on the indorsement by the defendants of a note payable to the order of the plaintiff. The only note offered in evidence was one payable to the order of the plaintiff, indorsed by the defendants. It was admitted that the note when indorsed by the defendants was a blank one, and that it was afterwards filled up by the maker, and made payable to the order of the plaintiff, and not of the defendants. The motion shows that the only claim which the plaintiff made, on which any question arises, was, "that the court should instruct the jury that the legal effect of the defendants' writing their partnership name in blank on the back of the note, notwithstanding there was no special contract between the parties, was that of a guaranty to the plaintiff of the payment of the note, and not that of a collateral undertaking as indorsers." The judge in his charge did not sustain this proposition. We have already seen that by the law of this state he could not. A guaranty imports a promise that the note shall be paid at all events. Assuming that the fact that the note was in blank when indorsed by the defendants made no difference as to their liability, the claim which was made by the plaintiff was one which could not have been allowed. The refusal, therefore, of the judge to charge as claimed by the plaintiff was not a ground for a new trial. As the plaintiff did not ask the court to leave this part of the case to the jury on any other principle of law, he cannot complain now that it was not done.

The remarks of the judge with reference to the question

whether the indorsement was intentional or not apply only to the first count. But the admitted facts in the case show that there could be no recovery on that count. The defendants evidently could not be charged as ordinary indorsers. The evidence introduced by the plaintiff himself showed also that no legal notice was given. It is unnecessary, therefore, to inquire whether these remarks were correct or not, as the plaintiff could not have been injured by them.

A new trial is not advised.

In this opinion HINMAN, C. J., and PARK, J., concurred.

BUTLER and McCURDY, JJ., delivered dissenting opinions.

IN CONNECTICUT, BLANK INDORSEMENT OF NON-NEGOTIABLE NOTE IMPLIES WARRANTY that the maker is able to pay it, and that it is collectible by due diligence: *Prentiss v. Danielson*, 13 Am. Dec. 52, note 55, where this subject is considered. Indorsement of note in blank is by the law of Connecticut notice that the indorser is not *prima facie* an indorser for value or in the regular course of commercial business: *Atina National Bank v. Charter Oak L. I. Co.*, 50 Conn. 187, citing the principal case.

INDORSEMENT BY ONE NOT HOLDER OR PAYEE: See *Hall v. Newcomb*, 42 Am. Dec. 82, note 86, where this subject is discussed; *Moore v. Cross*, 75 Id. 326, note 330, where others cases are collected.

EFFECT OF INDORSING NON-NEGOTIABLE NOTE IN IOWA: See *Hall v. Monahan*, 71 Am. Dec. 404, note 405; *Peck v. Frink*, 74 Id. 384, note 386.

SIGNING OR INDORSING BLANK NOTE, EFFECT ON: See *Holland v. Hatch*, 71 Am. Dec. 363, note 369.

THE PRINCIPAL CASE IS DISTINGUISHED IN *Greathood v. Walton*, 40 Conn. 235.

BURROWS v. GALLUP.

[22 CONNECTICUT, 428.]

OWNER OF LAND WHO HAS BEEN DISPOSSESSED MUST ASSERT HIS CLAIM thereto by performing some act that will reinstate him in possession before he can regain what he has lost. A mere casual entry, or an entry by stealth under circumstances that go to show that he claims no right to enter, or an entry for other purposes than those connected with a right to enter, will not be sufficient to break the continuity of exclusive possession in the disseisor. It is therefore error for the court to charge that a person claiming a prescriptive right to a public landing "must have excluded the public, and every member of it"; an exclusion from the possession is all that is required.

WHERE HIGHWAY IS LAID OUT TO NAVIGABLE WATER AND THERE TERMINATES, the terminus may be presumed to have been intended for a public landing as an incident to the highway. But this presumption does not arise in the case of a highway running from place to place along the

shore of a navigable stream, and in immediate contact with it for a considerable distance. The question in such case depends on the circumstances, and is one of fact to be determined by the jury.

TRESPASS for entering upon a wharf on Mystic River, claimed by the plaintiff as his private property. Plea, the general issue, with notice that proof would be offered that the *locus* was a public highway and landing. On the trial, it appeared that the wharf was erected by Enoch Burrows, the grandfather of the plaintiff, adjoining the traveled path of an ancient highway, and between that and the Mystic River. The acts charged were admitted, and the defense was, that the wharf was built on a public landing-place by said Burrows, recognizing the rights of the public for more convenient use by the public and himself. The plaintiff proved a continuous use of the wharf by Burrows and his descendants to the time of the supposed trespass. The defendants claimed to have proved that it was originally a landing-place; that Enoch Burrows admitted it to be such when he built the wharf, and said that he built the wharf for the accommodation of the public as well as himself, and that it had always been used as a public wharf whenever the public had occasion to use it. The plaintiff denied that it had ever been a public landing-place, and claimed to have proved that the landing was below; that he had title to the land where the wharf was built; and even if originally a landing-place, he and those under whom he claimed had, by an exclusive possession, gained a title as against the public. The jury found for the defendants, and the plaintiff moved for new trial. The other facts are stated in the opinion.

Hovey and Wait, and A. F. Park, in support of the motion.

Lippitt and Halsey, contra.

By Court, PARK, J. Complaint is made of the charge of the court to the jury as to what it was necessary for the plaintiff, and the parties under whom he claims title, to have done in order to extinguish the right of the public to the *locus in quo* as a public landing. The court instructed them "that in order to destroy the public right they must have excluded the public and every member of it." It is said that this language gave the jury to understand that during the running of the statute the entry upon the premises of any member of the public, without permission of the party in possession, would prevent the acquisition of a prescriptive right in the plaintiff, whether

the entry was made for one purpose or another, and whether by stealth or otherwise. On the other hand, it is said that the court, in a subsequent part of the charge, so qualified the language complained of that the whole is rendered unexceptionable.

It was claimed by the plaintiff, and the court adopted the theory, that if the public had acquired a right to the *locus* for a public landing, it was such a right as could be lost by prescription. If this be true, it is quite evident that the charge was calculated to mislead the jury in determining whether it was lost.

The first part of the charge is specific. It requires the exclusion of every member of the public from the premises. The latter part is more general, and only renders it necessary that the public should be substantially excluded. The first part is more comprehensive than the last. The last does not purport to have been given to qualify or explain the first; neither can it receive that construction. They are independent representations of the law concerning the same subject-matter; and inasmuch as it cannot be known which part of the charge was received by the jury as the law of the case, we are required to consider whether either part gives the plaintiff cause to complain.

A title by prescription is based upon a grant conclusively presumed from an exclusive adverse possession of premises for a period of fifteen consecutive years. The owner must be ousted, and the ouster must continue uninterruptedly for the prescribed period of time. But when a party is once dispossessed it is not every entry upon the premises without permission that would disturb the adverse possession. He may tread upon his own soil and still be as much out of possession of it there as elsewhere. He must assert his claim to the land, perform some act that would reinstate him in possession, before he can regain what he has lost. It is evident, therefore, that an entry by stealth, under circumstances that go to show that the party claimed no right to enter, or an entry for other purposes than those connected with a right to enter, would not be sufficient to break the continuity of exclusive possession in another.

It is quite probable that the court intended to be understood by the language used in the first part of the charge, that every member of the public must be excluded from the possession of the premises; but in common parlance the language would

be understood differently. It would be taken to mean a physical exclusion,—an exclusion of mere casual entries upon the land such as have been alluded to; and it may be that the jury found for the defendants solely on this ground.

But the defendants claim that judgments should be rendered in their favor, however the jury might find in regard to the possession. They say that the facts of the case show that the premises in question form a part of a public highway at its junction with Mystic River, which is a navigable stream; and they claim that where a highway upon land comes in contact with navigable water, it is to be presumed that it was intended to have been dedicated to the uses of a highway and a public landing, and is not therefore the subject of prescription.

Where a highway is laid out to navigable water, and there terminates, there could be but little reason to doubt that it was designed for the purpose of loading and unloading freight and landing passengers from the water; and it would thereby become a public landing as an incident to the public highway. But suppose a highway, in running from place to place, incidentally comes in contact with tide-water, and runs along the beach for a considerable distance on account of facility in its construction or other cause, would the whole length of the highway bordering tide-water, which might be many miles, *ipso facto* become a public landing, irrespective of its need or fitness for such a purpose, so that the owner of the soil could not appropriate any part of the shore to his own purposes, although the fact was apparent that the public would not be thereby incommoded? If the law is so, a different principle prevails along the line of contact of these highways from that which governs each when separated.

It has been adjudged in many cases that the owner of the soil may do such acts upon his own land, within the limits of a public highway, as do not interfere with the public easement: *Bartlett v. Everts*, 8 Conn. 523; *Burnham v. Hotchkiss*, 14 Id. 312; *Hopkins v. Crombie*, 4 N. H. 520. And there is abundant authority that the owner of land along the sea-shore may do in like manner with his soil covered by the sea, if navigation is not thereby incommoded: Angell on Tide-waters, 159; *East Haven v. Hemingway*, 7 Conn. 186; *Frink v. Lawrence*, 20 Id. 118; *Groton v. Hurlburt*, 22 Id. 178. The principle running through these cases, and many more that might be cited, is, that what remains, after giving the public full enjoyment of their rights, belongs to the owner of the soil.

And why should not the same principle govern in regard to a public landing arising from the contact of these highways? Can any good reason be given in the case supposed, why the whole length of the contact should perpetually remain a landing, where the supposition is that a small part of it is capable of furnishing, and in fact does furnish, all the conveniences for the full enjoyment of the public right? Can anything more be asked for such a right than full enjoyment? If so, it must be to gratify the caprice of some erratic navigator.

It certainly would be a novelty in judicial proceedings if a prosecution could be sustained in such a case against the owner of the soil who had erected a wharf for his own purposes at a place within the contact, but not required for any public use. Upon what principle the court could declare such erection a nuisance it is not easy to see.

It may be that public landings *prima facie* exist along the line of contact of all highways with tide-water, as incident to such highways, as all water where the tide ebbs and flows is *prima facie* navigable, notwithstanding its unfitness for navigation in fact. But such general principles of law are brought within the bounds of reason when undergoing judicial examination. Judge Ellsworth, in giving the opinion of the court in one of the cases cited, says: "It is time the public should understand that not every ditch in which the tide ebbs and flows through the extensive salt marshes along the coast, and which serves to admit and drain off the salt water from the marshes, can be considered a navigable stream; nor is every small creek in which a fishing-skiff or gunning-canoe can be made to float deemed navigable; but in order to have this character it must be navigable for some general purpose useful to trade or business." And so it might be said in relation to landings of the class we are considering, that notwithstanding their *prima facie* character they must be needed for public use, and must be restricted in extent to what is beneficial to the public.

The cases cited fully establish the doctrine that the owner of land along the sea-shore may erect a wharf adjoining his land, and enjoy it as his own, taking care not to interfere with navigation. The enjoyment of a wharf necessarily requires a way, either public or private, connected therewith. Suppose the former exists. Now, if the wharf no more interferes with the rights of the public in relation to a landing than it does in regard to navigation, the case clearly comes within the principle of those cases, and the party may enjoy his wharf.

The application of these principles to the case in hand is readily seen and easily made. Although a public landing at the *locus in quo* may have existed *prima facie* at the time the plaintiff's ancestor erected the wharf, still, whether it was needed for the purpose, so that the wharf could not become the property of the plaintiff, would depend upon circumstances, and is a question of fact to be determined by the jury. The motion does not state the facts necessary to enable us to decide this question and to judge therefore whether substantial justice has been done by the verdict.

It was stated, however, by the counsel for the defendants, that the highway was laid out in 1698, running "by Mystic River side." If this was so, it would seem that the highway runs along the bank of the river for a considerable distance, and only incidentally comes in contact with it; for the highway was laid out at a time when it may fairly be inferred that there was not commerce enough on this stream to require the laying out of a highway for its enjoyment.

We cannot say, therefore, that substantial justice has been done in the case, and a majority of the court are of the opinion that a new trial ought to be granted, and so we advise the superior court.

In this opinion HINMAN, C. J., and DUTTON, J., concurred.

McCURDY, J., dissented.

BUTLER, J., having tried the case in the court below, did not sit.

WHAT ENTRY BY OWNER OF REALTY TERMINATES ADVERSE POSSESSION: See *Peabody v. Hewett*, 83 Am. Dec. 486, note 497, where this subject is considered at length.

BAILEY v. TOWN OF GOSHEN.

[82 CONNECTICUT, 546.]

WHERE PERSONAL PROPERTY IS TAKEN BY COLLECTOR IN SATISFACTION OF ILLEGAL TAX and sold, and the avails paid to the town, the owner may recover back the money in an action of *assumpsit* against the town.

ASSUMPSIT to recover the amount of a tax illegally collected of the plaintiff. The court below rendered judgment for the plaintiff, and the defendants moved for a new trial. The other facts are stated in the opinion.

Hubbard and Andrews, in support of the motion.

Hall, contra.

By Court, McCURDY, J. The legal principles examined at some length in the case of *Cobb v. Charter*, 32 Conn. 858 [*ante*, p. 178], are strictly applicable to the present case.

The tax, on account of which this suit is brought, is admitted to have been illegal. In satisfaction of it the plaintiff's bank stock was taken by the collector and sold, and the avails were paid to the town. It requires no argument to prove that for such an injury there should be some redress; and we had supposed it to be an elementary principle that *indebitatus assumpsit* was the established remedy. In 1 Swift's Digest, 405, it is laid down that "where a person pays taxes that are illegally imposed upon him, whether paid by compulsory process or not, he may recover back the money." The case of *Atwater v. Woodbridge*, 6 Conn. 223 [16 Am. Dec. 46], is precisely of this character. The tax was illegal, and was collected by distress of the plaintiff's property. The money was paid over to the town, and then recovered back in the action of *assumpsit*. In *Adams v. Litchfield*, 10 Id. 127, it was held that "the action of *indebitatus assumpsit* for money had and received is the appropriate remedy for money collected under an illegal assessment." Chief Justice Daggett, in giving the opinion, says: "It was made a question whether this action of *assumpsit* was the proper action to try the question of the legality of the tax. On this point I entertain no doubt. The cases are numerous in which actions of *assumpsit* are sustained": *Amesbury Mfg. Co. v. Amesbury*, 17 Mass. 461; *Sumner v. Dorchester*, 4 Pick. 361; *Preston v. Boston*, 12 Id. 7; *Perry v. Dover*, 12 Id. 206; *Torrey v. Millbury*, 21 Id. 64; *Boston and Sandwich Glass Co. v. Boston*, 4 Met. 181; *Joyner v. Third School District*, 3 Cush. 567.

In opposition to this current of authorities two decisions in this state are relied upon by the defendants. In *Sheldon v. South School District*, 24 Conn. 88, it was indeed decided that the money collected on the illegal tax could not be recovered back. But in that case it was the plaintiff's land which had been levied upon and sold, or rather attempted to be sold, for the payment.

The title did not pass, and the money received from the sale of course did not belong to the one who was still owner of the

estate. Judge Waite, giving the opinion, expressly declares that *assumpsit* can be sustained to recover money "paid without sufficient consideration to avoid imprisonment, or the seizure or sale of goods." He makes a distinction between the case then on trial and that of *Adam v. Litchfield*, 10 Conn. 127, upholding the decision in the latter "upon the familiar principle that the owner of goods which have been taken and sold by a trespasser might, at his election, waive the tort, and treat the wrong-doer in making the sale as his agent, and the money received by him as received for the use of the owner."

Land is not the subject of duress, and the principle of waiving a tort does not apply to a case of disseisin. An action of *assumpsit* upon the ground that the plaintiff had been wrongfully driven from his farm, and the estate had been seized and sold by a stranger, would certainly be a novelty.

In *Goddard v. Seymour*, 30 Conn. 394, the taxes were legally laid and assessed, but the proceedings to collect them were irregular and invalid. One of the taxes was paid without question, and the other was collected by a levy upon the plaintiff's goods. In relation to the first tax the decision in substance was, that the amount of it being a debt justly due from the plaintiff to the town, which he was bound to pay without waiting to be called upon, and which he had paid voluntarily, the town had a moral right to retain it; and the action of *assumpsit*, being an equitable one, would not lie to recover it back.

In respect to the other tax it was held that, as the proceedings connected with the assessment rendered the sale absolutely void, the goods still belonged to the plaintiff, and the money did not, unless he waived the tort; and if he elected to waive the tort and to consider the collector his agent in receiving the money and paying it over to the town, then this tax stood upon the same footing as the other, that is, it was to be regarded as a voluntary payment of a just debt. In the case before us the tax was illegal.

We perceive nothing in these decisions inconsistent with what we understand to be the settled law in this state and elsewhere.

A new trial is not advised.

In this opinion the other judges concurred.

MONEY PAID UNDER COMPELSION, WHAT IS, AND WHEN MAY BE RECOVERED BACK: See *Brumagin v. Tillinghast*, 79 Am. Dec. 176, note 184, where other cases are collected; see also *Cobb v. Charter*, ante, p. 178, and note.

ILLEGAL TAX, RECOVERY BACK OF, AFTER PAYMENT: See *Taylor v. Board of Health*, 72 Am. Dec. 724, note 725, where other cases are collected.

CALKINS v. CITY OF HARTFORD.

[83 CONNECTICUT, 57.]

EVIDENCE THAT NUMBER OF PERSONS PASSED ALONG SIDEWALK WITHOUT HARM is admissible, in an action to recover damages for injuries received from slipping on a formation of ice extending entirely across the sidewalk, to show that the ice was not slippery and dangerous, for the attention of all who passed over the sidewalk would necessarily be drawn to the ice, and their experience be substantially the same.

ACTION to recover damages for injuries received from a fall upon a sidewalk in the city of Hartford, the action being founded on the statute concerning highways and bridges. The verdict was for the plaintiff, and the defendant moved for a new trial. The opinion states the case.

T. C. Perkins and Strong, for the motion.

F. Chamberlin and E. Hall, contra.

By Court, DUTTON, J. In this case the plaintiff offered evidence tending to show that she sustained an injury by slipping on a formation of ice, which had remained about four days on a sidewalk in the city of Hartford, extending entirely across the walk somewhat diagonally, from one and a half to two feet wide at the outer edge of the walk and some three feet wide in the center, about four and a half inches thick in the thickest part and sloping to a thin edge, and that it was dangerous to cross.

The defendants offered evidence tending to prove that there was no such body of ice, and that if there was, it did not remain so long and was not dangerous.

To sustain their claims the defendants offered evidence to show that a number of persons, during the whole time claimed, repeatedly passed along and over the sidewalk in question without slipping thereon, or experiencing any inconvenience whatever. The court admitted this evidence to prove that there was no such body of ice, and that if there was, it remained there for a much shorter time than the plaintiff claimed, but not to prove that, if there, it was not dangerous.

We think the court erred in not allowing this evidence to go to the jury for what it might be worth. We do not see how this evidence could consistently be admitted as tending to show that there was no ice, and not as tending to show that the ice, if there was any, was not dangerous by the use of ordinary care.

One of the most satisfactory kinds of evidence is that which is founded on the natural relation of cause and effect as ascertained by observation and experience. The plaintiff founded her claim upon the result of the common experience of mankind, that a glade of ice usually causes any person passing over it to slip. If she could succeed in satisfying a jury that there was a formation of ice of the description claimed, she would make out a *prima facie* case that the sidewalk was dangerous, not from the single fact that she slipped, but from the fact established by the common experience of mankind, that any person crossing such a formation in its primary condition would be liable to slip. But the same observation and experience teach us that such a formation may in a few days, by the effect of frequent passing, become soiled and worn, and by the action of the sun and other causes become rough and cease to be slippery, and consequently, in that respect, will cease to be dangerous. One important question in this case was, whether, if the ice was there, it was or was not in a slippery and dangerous condition.

If the plaintiff had offered evidence to show that a number of persons had actually slipped upon it, it would have been strong proof that it was in a slippery and dangerous condition. Men always act on such evidence in deciding whether they will risk their limbs or not. Why, then, should not proof that a number of persons passed over it and did not slip be admitted as tending to show that it was not in a slippery condition?

We have been asked whether the fact that a number of persons passed in safety a bridge in which it was claimed there was a dangerous hole would be admissible to prove that there was no such hole, or, if there was, that it was not dangerous. It is unnecessary to answer that question. Many persons might cross the bridge without passing over the hole. If the claim was that a plank reaching the whole width of the bridge was gone, it would bear a stronger resemblance to the present case. Here, all who passed over that sidewalk must have either stepped upon the ice or have taken an unusual stride

to step over it. Their attention would necessarily have been drawn to it.

We think the rejection of this testimony would be, to some extent, inconsistent with the decision of this court in *House v. Metcalf*, 27 Conn. 631. In that case, it was necessary for the plaintiff to prove that a water-wheel, revolving in an exposed condition near a highway, was dangerous, and that the plaintiff's horse was frightened by it. To establish the fact that it was dangerous, it was held to be competent to prove that other horses were frightened by the same wheel. The objection was pressed in that case, as it has been here, that it would raise a collateral issue. But Sanford, J., answers that objection by remarking that every piece of evidence, in every case, might be exposed to the same objection. It is plain that a collateral issue may be made at any time by an attempt to impeach a witness. Still, the jury ought to have the benefit of all testimony from which a reasonable inference may be drawn of the existence or non-existence of any material fact which is in issue in a case.

The court below may have been led to the decision in question by several cases which have been decided in Massachusetts. Whether we should be disposed to follow those decisions to the full extent it is not necessary to determine. A plain distinction can be drawn between those cases and the present.

In the first of those cases, *Collins v. Dorchester*, 6 Cush. 396, the plaintiff claimed that there was a line of posts on the outside of a highway which passed through a swamp to protect the traveled path, and that the plaintiff's carriage ran against one of these posts in consequence of the absence of some others on the line which should have been near it. The plaintiff offered evidence to show that the carriage of another person had previously run against a post under similar circumstances, at or near the same place, from the same alleged defect. The supreme court of Massachusetts held this evidence inadmissible, chiefly on the ground that it would raise a new issue. There the alleged defect was entirely outside of the traveled path, and would not affect any person who kept on it. The case of *Aldrich v. Pelham*, 1 Gray, 510, turned in part on the question whether the traveled path was wide enough to allow two carriages to pass conveniently. Evidence that other persons had passed without collision or accident was rejected. The decision seems to have been governed by that in *Collins v. Dorchester*. 6 Cush. 396, with a suggestion of the

court that the proper evidence in such a case would be an actual measurement of the width, as that could easily have been made.

The case of *Kidder v. Dunstable*, 11 Gray, 342, was merely a reiteration of the doctrine of the former cases, and an application of it to general evidence that other teams passed and re-passed the place where the plaintiff claimed to have been injured, without accident or difficulty. None of these cases presented a state of things where, as in this case, the experience of all who passed must have been substantially the same.

We advise a new trial.

In this opinion the other judges concurred, except HIRMAN, C. J., who dissented.

EVIDENCE AS TO WHETHER DEFECT IN HIGHWAY CAUSING INJURY WAS DANGEROUS. — In *Taylor v. Town of Monroe*, 43 Conn. 42, it is held, distinguishing the principal case, that, in a suit against a town for an injury from a defect in a highway, where the alleged defect was the want of a railing along an elevated part of the road, and the injury occurred in a manner so peculiar and exceptional as to put the necessity of the railing to a test that ordinary travel would not furnish, the experience of others who had passed safely along the same road was not pertinent, and evidence of it was inadmissible in behalf of the town. To render such evidence admissible, "the use and experience of others relied upon must have been of a nature to have tested the alleged defect; or in other words, it must have been a use and test substantially similar to that of the plaintiff." Safety and convenience for travelers and their teams and vehicles constitute the criterion by which it is to be determined whether or not there be any defect or want of repair or sufficient railing upon highways: *Stinson v. City of Gardiner*, 66 Am. Dec. 282. As to the evidence of the condition of streets in other towns in the vicinity, see *Raymond v. City of Lowell*, 53 Id. 57, and note 67.

BISHOP v. BANKS.

[23 CONNECTICUT, 118.]

NUISANCE MAY BE PRODUCED BY OFFENSIVE SOUNDS in the prosecution of a business lawful *per se*.

BLEATING OF CALVES KEPT OVER NIGHT AT SLAUGHTER-HOUSE, to be slaughtered the next day, to the great annoyance of a family living near, is a nuisance, and will be enjoined.

PRODUCTION OF OFFENSIVE SMELLS FROM OFFAL OF SLAUGHTERED ANIMALS is a nuisance, and will be enjoined.

PETITION for an injunction against maintaining a slaughter-house near the petitioner's dwelling. A committee found the facts, and with respect to the bleating of calves found that the

respondent during a considerable portion of the time kept a number of calves in his slaughter-house over night, to be killed the next day; that calves thus separated from the cows become very hungry, and bleat in a plaintive and almost incessant manner by day and night, and that the petitioner and his family, who lived near the slaughter-house, were greatly annoyed thereby, and their sleep disturbed, and they were driven at times from the occupation of that part of their house nearest the slaughter-house, by the bleating of the calves; that the keeping of calves in this manner is a great convenience to those engaged in the business of slaughtering, and is customary among those engaged in it in Bridgeport, because the calves are brought in car-loads at a time and at intervals. The committee also found that some unpleasant odor from the slaughter-house was occasionally perceived in warm and damp weather when the wind favored, but that it had not become sufficiently annoying to constitute a nuisance in fact when the injunction was served; that the respondent had swine at his slaughter-house to consume the offal, and did not remove it; and that slaughter-houses where swine are kept to consume offal and make manure are generally a serious annoyance, during the summer months, to persons living near them; but that it is possible to prevent this by an immediate removal of the offal or a very frequent removal of the manure and sufficient attention to cleanliness. Upon these facts the case was reserved for the advice of this court.

Sturges, for the petitioner.

Beardsley and Seeley, for the respondent.

By Court, PARK, J. The respondent has successfully answered all the claims of the petitioner for a continuance of the injunction, with but one exception, and that is in relation to the bleating of calves kept upon the premises for slaughter. We think the facts found by the court below upon this subject are sufficient to require the interposition of the court to prevent its continuance. It is found that the annoyance to the petitioner proceeding from this cause was so great at times as to drive him and his family from the occupancy of that part of his house nearest to the premises of the respondent. The court presents an extreme case of the kind,—one that will constitute a nuisance, if a nuisance can be produced from such cause. In the cases of *Whitney v. Bartholomew*, 21 Conn. 213,

and of *Brown v. Illius*, 27 Id. 84 [71 Am. Dec. 49], this court distinctly recognize the doctrine that a nuisance may be produced by offensive sounds in the prosecution of business lawful *per se*. The same doctrine is held in the case of *Soltan v. De Held*, 9 Eng. L. & Eq. 104, where an injunction was granted to restrain the ringing of church bells by a Roman Catholic community, although they were rung only upon the sabbath. They were located so near a person's residence that his peace and quiet were greatly disturbed. If sounds of such a character, and so made, can be sufficient to constitute a nuisance, how can it be questioned in the case under consideration?

It is difficult to conceive of any noise more destructive to the comfort and happiness of a family than the constant wailing of animals in distress in the immediate vicinity of their residence. Enjoyment under such circumstances would require nerves of brass and a heart of steel. But it is unnecessary to pursue this subject, for reason and law harmonize in declaring that the conduct of the respondent in this particular is unlawful and wrong. He should remember the maxim, *Sic utere tuo ut alienum non lædas*, and conduct accordingly.

The remaining claims urged by the petitioner for a continuance of the injunction are not supported by the allegations of his bill, and we do not therefore consider them.

We advise the superior court to so modify the injunction that the respondent may be allowed to prosecute his business, but to prevent the bleating of calves, and the raising of offensive smells, to the annoyance of the petitioner.

In this opinion the other judges concurred.

PARTY WHO SUFFERS SPECIAL INJURY FROM PUBLIC NUISANCE is entitled to have it enjoined: *Milham v. Sharp*, 84 Am. Dec. 314, and note. And carrying on a slaughter-house in a city may be enjoined: *Catlin v. Valentine*, 38 Id. 567, and note 568.

WHAT CONSTITUTES NUISANCE: See *Norcross v. Thoms*, 81 Am. Dec. 588, and cases cited in the note 591. A lawful as well as an unlawful business may be carried on so as to prove a nuisance: *Id.* It is sufficient to constitute a nuisance that it is offensive to the senses, and renders the enjoyment of life and property uncomfortable. Thus a slaughter-house may be a nuisance: *Catlin v. Valentine*, 38 Id. 567, and note 568.

BRADLEY v. NORTON.

[33 CONNECTICUT, 157.]

EXCLUSIVE RIGHT TO TRADE-MARK IS RECOGNIZED BY LAW as a species of property.

IMITATION OF TRADE-MARK, TO CONSTITUTE INFRINGEMENT, NEED NOT BE PRECISE COPY; but if there is a substantial similarity, so that the community would be likely to be deceived, it is sufficient.

INJUNCTION IS SOLE ADEQUATE REMEDY AGAINST INFRINGEMENT OF TRADE-MARK, where it appears that the party infringing intends to continue the wrong.

INJUNCTION AGAINST INFRINGEMENT OF TRADE-MARK MAY BE GRANTED though the party defendant is in fact only the agent of the manufacturer of the spurious article, where the latter has conducted the business through such agent and held him out to the public as the proprietor.

ONE WHO HAS SOLE INTEREST IN TRADE-MARK MAY MAINTAIN SUIT FOR INJUNCTION against the infringement thereof without joining as a party one who is a silent partner with him in the business of manufacturing the article.

ASSIGNMENT FOR BENEFIT OF CREDITORS IS INOPERATIVE AS TO RIGHT TO TRADE-MARK which was not inventoried by the trustee or appraisers, and never claimed by the trustee or the creditors, nor in any manner disposed of under the assignment.

ACTS OF RESPONDENT ARE SUFFICIENT EVIDENCE OF HIS INTENTION to continue the infringement of a trade-mark, without averring and proving threats.

BILL for an injunction, averring that respondent had used and still continued to use a trade-mark belonging to the petitioner, and praying that he be enjoined from its further use. A general denial was filed by the respondent, and the question as to the decree to be rendered in the premises was reserved for the advice of this court upon a special finding of the facts by the superior court, as follows: Andrew Coe, in 1851, invented a valuable fertilizer, which he manufactured and sold in considerable quantities under the name of superphosphate of lime, and it soon became widely known to the public by the distinctive name of "Coe's Superphosphate of Lime," and by that name alone was advertised and sold. In December, 1854, he became insolvent and made an assignment of his property for the benefit of his creditors; but the trade-mark was not embraced in this assignment, unless it would legally pass by virtue of the general language of the assignment conveying all the debtor's property. It was not inventoried by the trustee or appraisers, and was never claimed by the trustee or the creditors, nor in any manner disposed of under the assignment. In 1855, Andrew Coe removed from Middletown to Roxbury, Massachusetts, and there entered into a copart-

nership with Russell Coe and Elmore F. Coe, under the name of Coe & Co., and resumed the manufacture of his fertilizer, having given to this firm license to use the name and mark of "Coe's Superphosphate of Lime." In April, 1862, this co-partnership was dissolved, and the business permanently suspended; but up to that time the manufacture of the article was prosecuted extensively, the packages being stamped "Coe's Superphosphate of Lime, Boston, Mass.," or "Coe's Improved No. 1, Superphosphate of Lime, Boston, Mass.," or by other similar marks, indicating their particular quality. The manufacture of the fertilizer was carried on by Coe & Co. after the insolvency of Andrew Coe, and until April, 1862, at the factory in Middletown, where Andrew Coe had conducted his business prior to his insolvency. And since April, 1862, when Coe & Co. suspended business and dissolved partnership, the manufacture of the superphosphate of lime has been carried on at the same place, but in such a manner as not fully to disclose to the public the real proprietor of the business. Russell Coe sometimes signed bills and receipts, and performed other acts connected with the business, ostensibly as the agent of Norton, the respondent; and in that way, with the knowledge and consent of the respondent, held him up to the public as the proprietor. The respondent superintended the business in all particulars, and so far as the public could reasonably judge from the manner in which the business was conducted, was the proprietor; but in fact he was merely employed by Russell Coe as his overseer and foreman, Coe being the real proprietor. The fertilizer thus manufactured at Middletown since April, 1862, was sold under the mark of "Coe's Superphosphate of Lime, Middlefield, Conn., patented April 1, 1862"; and to this upon some packages was added, "manufactured by Russell & Co."; and other packages were marked "Coe's Superior Superphosphate of Lime, manufactured by R. Coe, Middlefield, Conn." By a written contract, dated November 7, 1861, Andrew Coe, acting both for himself and for the firm of Coe & Co., of Roxbury, licensed the petitioner, for a valuable consideration, to manufacture and sell the fertilizer, using the trade-mark of "Coe's Superphosphate of Lime." The petitioner built a factory at Roxbury, and manufactured the article in large quantities from the 1st of January, 1862, until the date of the petition, advertising and selling it under the distinctive name of "Coe's Superphosphate of Lime," and its composition was the same,

with some improvements, as that of the fertilizer discovered by Andrew Coe. By another contract, dated February 13, 1862, and made upon a valuable consideration, Andrew Coe conveyed to the petitioner the exclusive right to use this trade-mark for seven years, with a reservation only in favor of Coe & Co., of Roxbury, so long as they continued solvent and in their present course of business; and upon May 2, 1862, Russell Coe and Elmore J. Coe executed an instrument, made upon a like consideration, ratifying and confirming this conveyance. A patent for this fertilizer was procured April 1, 1862, and the petitioner is the assignee and owner of it. The petitioner is also the owner of the factory and other property used in his manufacturing business, and the business is carried on exclusively in his own name, but he has in fact a silent partner, whose existence is not known to the public.

Doolittle and Wright, for the petitioner.

Warner, for the respondent.

By Court, McCURDY, J. The principal questions on the merits are: 1. Has the petitioner an exclusive right to make and vend the article called "Coe's Superphosphate of Lime," under that description as a trade-mark? 2. Has that right been violated? and 3. Is this application the appropriate remedy for an injury?

1. That this species of property—the exclusive right to a trade-mark—exists and is recognized by law, is beyond question: 2 Swift's Digest, rev. ed., 157. It appears from the finding that Andrew Coe, after some years of experiment and effort in combining certain materials, had succeeded in inventing or discovering a valuable fertilizer, which became widely known, and sold in market, and extensively used by the public, under the distinctive name before mentioned.

In all countries the agricultural interest is of the greatest importance, and any improvement in the mode or amount of production must be of the highest value. It is perfectly right, therefore, that a discovery or invention which conduces to such improvement should be encouraged and allowed to become a source of emolument.

It is very obvious that Andrew Coe used the terms in question not merely as indicating a manufactured article, but to assert a right of property in the mode of making it. Such was the understanding of the parties, and without tracing the conveyances minutely it is sufficient to say that before the

bringing of this petition the exclusive title for at least seven years from the thirteenth day of February, 1862, had become vested in the petitioner. In the agreement of that date it is said that Andrew Coe, for many years, has been the sole and exclusive owner, with an immaterial exception, of a certain trade-mark, viz., "Coe's Superphosphate of Lime," which has become valuable, etc. This agreement was ratified and confirmed by Russell Coe and Elmore F. Coe, May 2, 1862, by an instrument in which it was stipulated that the petitioner should pay to them a certain portion of the profits of the business. Russell Coe, then, cannot be permitted to deny that the article is the proper subject of a trade-mark, and that the right to use it is valuable, and is the property of the petitioner. The respondent, from his business relations with Russell Coe, and especially if, as he claims, he is his mere agent, is embraced in the same restriction.

2. It is well settled that the imitation of a trade-mark to render a party liable need not be a precise copy. If there is a substantial similarity, so that the community would be likely to be deceived, it is a sufficient infringement of the right: *Law's Digest*, 374, 375, and the cases there cited.

Now, without repeating the different forms of words set forth in the finding of the court, it is evident that the variations between the descriptive terms used by Russell Coe and the respondent and those which constitute the petitioner's trade-mark are very slight and little calculated to attract attention. The article manufactured by them must have been understood to be "Coe's Superphosphate of Lime." It was so intended by them; hence the false stamping of the article as "patented April 1, 1862," and the concealment of the true position of the parties in transacting the business.

3. An injunction is the sole adequate remedy. In an action at law it would be impossible to trace the extent or ascertain the amount of the mischief. The spurious article might by its cheapness supersede the true one, or by its inferiority destroy its character and drive it from the market.

4. The parties are right. From the mode of conducting business adopted by Russell Coe and the respondent, either may be considered as a principal for the purpose of this case.

The petitioner had the sole interest in the trade-mark, and was justified in instituting legal proceedings in his own name to protect his property. Courts of equity often require new parties to be joined for fear that injustice may be done, or that

the decision may not be final. These reasons do not exist in this case.

5. The assignment was incomplete and inoperative in relation to this right, and the respondent cannot be permitted to set it up to screen himself from the consequences of his illegal proceedings.

6. The acts of the respondent were sufficient evidence of his intention to continue the wrong, without averring or proving threats.

We advise that the injunction be made perpetual.

In this opinion the other judges concurred.

RIGHT TO TRADE-MARK IS PROPERTY, AND ITS INFRINGEMENT WILL BE ENJOINED: *Woodward v. Lamar*, 82 Am. Dec. 751, and note 753; *Bowman v. Floyd*, 80 Id. 55, and note 59; *Barrows v. Knight*, 78 Id. 452, and note 454; *Marsh v. Billings*, 54 Id. 723; *Partridge v. Menck*, 47 Id. 281, and extensive note 284 et seq.

IMITATION OF TRADE-MARK CALCULATED TO DECEIVE IS INFRINGEMENT: *Woodward v. Lamar*, 82 Am. Dec. 751, and note 753; *Barrows v. Knight*, 78 Id. 452, and note 454. See extensive note to *Partridge v. Menck*, 47 Id. 284-299, on what constitutes a trade-mark and the infringement thereof, citing the principal case at pages 285 and 296. The principal case is cited to the point that in order to authorize the interference of chancery it is not necessary that the trade-mark should be copied with the fullest accuracy. An imitation which varies from the original in some particulars will be restrained. The rule is, that if the imitation is calculated to deceive, and may be taken for the original, its use will be restrained: *Shaver v. Shaver*, 54 Iowa, 211; *Gilman v. Hunnewell*, 122 Mass. 152.

ASSIGNMENT FOR BENEFIT OF CREDITORS, WHETHER PASSES PROPERTY NOT ENUMERATED IN SCHEDULE: *Nye v. Van Huse*, 74 Am. Dec. 690, note 692; *Scott v. Coleman*, 15 Id. 71; *Wilkes v. Ferris*, 4 Id. 364.

CASES
IN THE
SUPREME COURT
OF
ILLINOIS.

RANKIN v. RANKIN.

[86 ILLINOIS, 232.]

INTERLOCUTORY DECREE, RENDERED BY CONSENT, REFERRING CASE TO MASTER "for hearing and determination on the merits," and requiring him "to render a decree on the merits, and report the same," though much broader in its terms than common, will still be regarded merely as a reference for the opinion of the master, and his report will be subject to the supervision of the court.

EXECUTORS HAVE POWER TO SELL LAND OF TESTATOR WITHOUT DECREE OF COURT OF EQUITY where the testator directs the land to be sold, and the proceeds to be distributed to certain persons, without declaring by whom the sale shall be made; for such disposition is to be regarded as a bequest of a fund distributable to the legatees by the executors, who therefore take by implication the power to sell the land and convert it into money without a decree of court.

EXECUTOR TAKES POWER OF SALE BY IMPLICATION where a testator directs his estate to be sold for certain purposes, without declaring by whom the sale shall be made, provided the proceeds are distributable by the executor.

MONEY DIRECTED TO BE EMPLOYED IN PURCHASE OF LAND, and land directed to be sold and turned into money, are to be considered as that species of property into which they are directed to be converted.

BILL by the defendant in error against the plaintiffs in error to set aside a sale and deed made by the executors of John Rankin, under which the plaintiffs in error claimed title. Decree was rendered in favor of the complainant, and the defendants sued out a writ of error. The opinion states the case.

Ross and Winter, for the plaintiffs in error.

Goudy, Judd, Boyd, and James, for the defendant in error.

By Court, LAWRENCE, J. In 1852 John Rankin died in Fulton County, leaving a will which contained the following clause: "My farm, thirty-five acres and upwards, to be disposed of to the very best advantage, either in a body or divided into lots, and the proceeds thereof to be divided into four equal parts, as follows: One fourth to be divided equally among and given to the heirs of my son Stephen; one fourth to be given to my son William; one fourth to be given to my son Rhodes; and one fourth, or the balance of the proceeds of said land, to be given to my daughter Abigail." He appointed as his executors his son and son-in-law, William Rankin and Joseph Beans, who duly qualified, and in 1853, as such executors, sold said land at public auction, after advertising the sale by posting notices and by publication in a newspaper. This bill is filed by Rhodes Rankin, one of said devisees, for the purpose of setting aside said sale. It charges fraud in the sale, but these allegations are unsustained by proof, and in their brief the counsel for the complainant rest their case, as to its merits, entirely on the question whether the clause of the will, above quoted, authorized the executors to make the sale without invoking the aid of a court of equity.

They first, however, raise a preliminary point upon the report of the master in chancery. A decree was rendered by the court below, by consent of parties, referring the case to the master "for hearing and determination on the merits," and requiring him "to render a decree on the merits, and report the same." It is urged by the counsel for the defendant in error, complainant below, that this is to be considered as an arbitration and award, by which the parties are concluded. Even if it could be considered as an award, the parties must be left to their common-law remedies. It is only upon awards made in pursuance of our statute that the court can pronounce a judgment or decree: *Low v. Nolie*, 15 Ill. 368. In that case the parties had agreed that the court should enter judgment upon the award, but exceptions being taken, the court refused. Here, the party claiming the benefit of the award is the complainant who asks the decree. For that purpose the award is unavailing. The statute requires a suit pending in court, if referred to arbitration, to be submitted to three arbitrators. In this, as in other respects, the award, if it could so be called, does not conform to the statute. It is not, however, to be supposed that the parties intended anything more than an ordinary reference to a master, for the purposes of a report, to

which exceptions could be filed according to the usual practice. The reference is much broader than is common, but can still be only considered as a reference for the opinion of the master, and for the preparation of a decree by him, subject to the supervision of the court to which he is required to report. In England, and in some of our sister states, there are certain classes of questions, judicial in their character, which are always referred to masters, such as exceptions to bills for scandal or impertinence, or exceptions to depositions. This practice is also adopted by some of our circuit judges, but the action of the master is of course always subject to the supervision of the court.

We now come to the construction of the will. No question can be, nor, indeed, is made, as to the intent of the testator that the land should be sold. But it is urged that the executors had no power to make the sale. "It sometimes happens," says Williams on Executors, page 413, "that a testator directs his estate to be disposed of for certain purposes, without declaring by whom the sale shall be made. In the absence of such a declaration, if the proceeds be distributable by the executor, he shall have the power by implication. Thus a power in a will to sell or mortgage, without naming a donee, will, unless a contrary intention appear, vest in the executor, if the fund is to be distributable by him, either for the payment of debts or legacies." This principle is well settled, and is not controverted by the counsel for the defendant in error, but it is contended that the proceeds of this sale were not distributable by the executors. The same learned author whom we have already quoted, on page 414, uses the following language: "It is an established doctrine in courts of equity that things shall be considered as actually done which ought to have been done, and it is with reference to this principle that land is under some circumstances regarded as money, and money as land. It is laid down by Sir Thomas Sewell, in *Fletcher v. Ashburner*, 1 Bro. C. C. 497, 'that nothing was better established than this principle, that money directed to be employed in the purchase of land, and land directed to be sold and turned into money, are to be considered as that species of property into which they are directed to be converted.' It follows, therefore, that every person claiming property under an instrument directing its conversion must take it in the character which that instrument has impressed upon it; and its subsequent devolution and disposition will be governed by the rules appli-

cable to that species of property." This principle is familiar law, and has been recognized to the fullest extent by this court in *Baker v. Copenbarger*, 15 Ill. 103, and *Jennings v. Smith*, 29 Id. 116.

This principle is decisive of this case. The land was directed to be sold, and its proceeds divided among certain persons named in the will. It was, then, to be considered as a bequest of money. In the language above quoted, and the accuracy of which was approved in *Wheldale v. Partridge*, 5 Ves. 396, "it is to be considered as that species of property into which it was directed to be converted." It is, then, a fund distributable by the executors to the devisees, and as such passes through their hands by virtue of their office. This gave them the power to sell, according to the principle stated above in *Williams on Executors*. The same principle is laid down in the fourth edition of *Sugden on Powers*, where all the cases are collected. The case of *Bentham v. Wiltshire*, 4 Madd. 44, cited by the counsel for the defendant in error, is not really adverse to this, because there the estate was devised to the wife for her life, to be sold after her decease, and the money to be then distributed. The wife and another person were appointed, by the will, executors. The court held they had no power to sell, and gave as the reason that they had nothing to do with the proceeds of the sale. They could not have, because the sale was not to take place until after the death of one of the executors. The case is in perfect harmony with the principles above set forth.

It is urged that moneys proceeding from the sale of real estate, directed to be divided among the testator's children, are not legacies. "Of legacies," says Toller on *Executors*, p. 301, "there are two descriptions: a general legacy and a specific legacy. The former appellation is expressive of such as are pecuniary, or merely of quantity." "A mere bequest of quantity, whether of money or of any other chattel, is a general legacy, as of a quantity of stock. And where the testator has not such stock at his death, such bequest amounts to a direction to the executor to procure so much stock for the legatee." The same distinction is laid down in other text-writers: 4 *Bac. Abr.* 337, 425; 2 *Bla. Com.* 512.

This was a bequest of the proceeds of certain real estate, directed by the testator to be sold for the purpose of conversion into money. In the view of a court of chancery, it was a bequest of money. Had it been, in terms, such bequest, it

would have been the duty of the executors to distribute the fund to the legatees, and it clearly follows, from the principles above laid down, that they took by implication a power to sell, and thus convert the land into money, and distribute the proceeds. This power they seem to have exercised fairly and in good faith, and the sale by them should be sustained

Decree reversed and case remanded.

WHEN EXECUTORS AND OTHER TRUSTEES ARE BY IMPLICATION VESTED WITH POWER TO SELL. — With respect to executors and administrators it is a general rule of law and equity that they have an absolute power of disposal over the whole personal effects of the testator or intestate, and that such assets cannot be followed by creditors, and much less by legatees, either general or specific, into the hands of the alienee; and though this rule is subject to some exceptions and restrictions, as where there is collusion between the executor and purchaser, or the executor purchases at his own sale, or where the statute imposes restraints, yet the general rule is that the power of sale of personalty is incident to the office of executor or administrator: See 2 Williams on Executors, 6th Am. ed., 998; 1 Id. 709; Schouler on Executors and Administrators, sec. 339; *Bond v. Zeigler*, 44 Am. Dec. 656. This is because the title to the personal property vests in the executor or administrator for purposes of administration and distribution. But real property vests in the heirs and devisees at the death of a decedent, and an executor has no power of sale with respect to such property, unless he receives it under the will, either expressly or by implication: *Craig v. Craig*, 3 Barb. Ch. 76; *Lippincott v. Lippincott*, 19 N. J. Eq. 121. Other trustees have no power of sale over trust property unless by expression or implication it is given them, and any one purchasing from them with notice of the trust takes subject thereto.

No Set Form of Words Necessary. — The intention of the testator or trustor is, however, the "pole-star" of inquiry, and determines whether or not the executor or trustee is invested with the power of sale. This intention, as gathered from the instrument creating the trust, may be enunciated clearly and expressly, or may be indicated by implication, from the language used. And no precise or formal set of words is necessary to the creation of a power of sale; and language that may be fairly construed as conferring this power will be accorded that interpretation if the circumstances demonstrate its necessity: *Winston v. Jones*, 6 Ala. 554; *Dorland v. Dorland*, 2 Barb. 65; *Gersen v. Rinteln*, 2 Demarest, 246; *Hemel v. Barber*, 6 Hun, 540; *Morse v. Morse*, 85 N. Y. 59. Thus a codicil as follows: "I, D. J., make this codicil to my last will and testament; that is, I sell unto C. S. my tavern, house, and lot, with one third of the lot behind the barn, for the sum of \$6,959, provided he, the said C. S., satisfies my executors as to the payment of the same," empowered the executors to convey the land which the testator had agreed to sell upon the payment, by the vendee, of the purchase-money: *Jones v. Jones*, 13 N. J. Eq. 236. So, where a testator owned two tracts of land, — one in partnership with his brother, and another individually, — and empowered his executors to sell and convey the latter, and after his death the deed to the partnership tract, though in form absolute, was held to be a mortgage only, and the land being ordered sold to pay the mortgage, the executors bought it in, it was held that they took it, after their purchase, with the same power

to sell and convey it as was given with respect to the other tract: *Cummins v. Carrick's Ex'rs*, 2 Southwestern Rep. 490 (Ky.). So, also, a direction by a testator "that all the rest and residue of his estate, of what kind soever there might be at the time of his death," should be converted into money by his executors, extends to and includes such real estate as he may have acquired after the making of the will, and such land is subject to the power of sale conferred upon the executors: *Fluke v. Fluke*, 16 N. J. Eq. 478. And where a testator appointed three executors and empowered them to sell real estate, and afterwards, by a codicil, revoked the appointment of one of them and appointed another person in his stead, the power to sell devolved equally upon the executor appointed by the codicil with the two appointed by the will: *Pratt v. Rice*, 7 Cush. 209. So a provision in a mortgage of real and personal property directing that when any amount or any note is due the mortgagee shall call on the mortgagor for the same, and if payment be made, nothing shall be done, otherwise the mortgagee shall advertise and sell enough to pay what is due, and the mortgagor shall direct what shall be sold, is a sufficient power of sale: *Hyman v. Devereux*, 63 N. C. 624.

But where a power is expressly given to executor over one portion of the estate, and is not expressly given over another portion, the omission manifests an intention that the power shall not be exercised on that portion of the estate over which it is not expressly given, although in another portion of the will general words are used broad enough to justify an implication that the whole estate should be subject to the power: *Anderson v. Anderson*, 31 N. J. Eq. 560; see also *Craig v. Craig*, 3 Barb. Ch. 76. So if the will gives direction for the insertion of all proper powers and authorities for making leases and doing other acts according to circumstances, a power of sale cannot be inserted: *Brewster v. Angell*, 1 Jacob & W. 625; *Horn v. Barton*, Jacob, 437. But where marriage articles contained a provision for a settlement "with all the usual and proper powers," it was held that powers of sale and exchange were properly introduced: *Peake v. Penlington*, 2 Ves. & B. 311; *Hill v. Hill*, 6 Sim. 136; *Williams v. Carter*, 2 Sugden on Powers, app. 23; 2 Sugden on Powers, 484. A power to sell includes the power to execute a conveyance: *Williams v. Otey*, 8 Humph. 653; S. C., 47 Am. Dec. 632.

DIRECTION TO SELL WITHOUT NAMING DONEE OF POWER.—When a will directs that land shall be sold, but names no donee of the power, and the proceeds of the sale are by the directions of the will or by the rules of law to be distributed or paid out by the executor or by a trustee, or other person, such executor, trustee, or other person will be invested with the power of sale by necessary implication, unless there is some other intention to be gathered from the whole will: 1 Sugden on Powers, 134, 139, mentioning several ancient instances of the application of this principle; 2 Perry on Trusts, sec. 501; 4 Kent's Com. 326; 1 Williams on Executors, 6th Am. ed., 726; 2 Redfield on Wills, 124; the principal case; *Newton v. Bennet*, 1 Bro. C. C. 135; *Carvill v. Carvill*, 2 Rep. Ch. 301; *Blatch v. Wilder*, 1 Atk. 420; *Robinson v. Lowater*, 17 Beav. 601; *Goeling v. Carter*, 1 Coll. C. O. 644; *Curtis v. Fulbrook*, 8 Hare, 278, correcting report of same case, 8 Id. 25; *Haydon v. Wood*, 8 Id. 279, note a; *Forbes v. Peacock*, 11 Mees. & W. 630; S. C., 11 Sim. 152; 12 Id. 523, 536; *Ward v. Devon*, 11 Id. 160; *Tylden v. Hyde*, 2 Sim. & St. 238; *Elton v. Harrison*, 2 Swanst. 276, note; *Winston v. Jones*, 6 Ala. 556; *Anderson v. Turner*, 3 A. K. Marsh. 131; *Magruder v. Peter*, 11 Gill & J. 217; *Putnam Free School v. Fisher*, 30 Me. 523; *Going v. Emery*, 16 Pick. 107; S. C., 28 Am. Dec. 645; *Tainter v. Clark*, 13 Met. 220, 223; *Gibbens v. Curtis*, 8 Gray, 392; *Oandler v. Rider*, 102 Mass. 268; *Hale v. Hale*, 137 Id. 168;

Mandlebaum v. McDonell, 29 Mich. 78; 8 O., 18 Am. Rep. 61; *Lippincott v. Lippincott*, 19 N. J. Eq. 121; *Seeger's Ex'rs v. Seeger*, 21 Id. 90; *Louderbough v. Weart*, 25 Id. 399; *Haggerty v. Lanterman*, 30 Id. 39; *Dorland v. Dorland*, 2 Barb. 63; *Bogert v. Hertell*, 4 Hill, 492; *Dawoue v. Fanning*, 2 Johns. Ch. 254; *Leonard v. American Baptist Home Mission Society*, 35 Hun, 290; *Meakings v. Cromwell*, 2 Sand. 512; S. C., 5 N. Y. 136; *Conklin v. Egerton*, 21 Wend. 430; *Foster v. Craige*, 2 Dev. & B. Eq. 209; *Vaughan v. Farmer*, 90 N. C. 607, 610; *Jones's Appeal*, 3 Grant Cas. 169; *Jenkins v. Stouffer*, 3 Yeates, 163; *Houck v. Houck*, 5 Pa. St. 273; *Gray v. Henderson*, 71 Id. 368; *Lockhart v. Northington*, 1 Sneed, 318. Thus the payment of debts and legacies is one of the functions of the office of executor, and therefore the executor will take an implied power of sale where the testator, without naming a donee of the power, directs that his land be sold and the proceeds applied to the payment of his debts: 1 Sugden on Powers, 135, 137; *Newton v. Bennet*, 1 Bro. C. C. 135; *Blatch v. Wilder*, 1 Atk. 420; *Curtis v. Fulbrook*, 8 Hare, 278; *Haydon v. Wood*, 8 Id. 279, note a; *Forbes v. Peacock*, 11 Mees. & W. 630; S. C., 11 Sim. 152; 12 Id. 528, 536; *Magruder v. Peter*, 11 Gill & J. 217; *Bogert v. Hertell*, 4 Hill, 492; *Meakings v. Cromwell*, 2 Sand. 512; S. C., 5 N. Y. 136; or to the payment of legacies: *Carvill v. Carvill*, 2 Rep. Ch. 301; *Greville v. Browne*, 7 Hoffm. L. Cas. 689; *Bench v. Biles*, 4 Madd. 187; *Curtis v. Fulbrook*, 8 Hare, 278; *Haydon v. Wood*, 8 Id. 279, note a; *Forbes v. Peacock*, 11 Mees. & W. 630; S. C., 11 Sim. 152; 12 Id. 528, 536; *Ellon v. Harrison*, 2 Swanst. 276, note; *Gibbens v. Curtis*, 8 Gray, 392; *Dawoue v. Fanning*, 2 Johns. Ch. 254; *Dorland v. Dorland*, 2 Barb. 63; *Meakings v. Cromwell*, 2 Sand. 512; S. C., 5 N. Y. 136; *Lockhart v. Northington*, 1 Sneed, 318. So where the executor is charged with the distribution of the proceeds of the sale by the will or by law, the power of sale goes to him by implication, for otherwise he could not execute his trust: *Forbes v. Peacock*, *supra*; *Ward v. Devon*, 11 Sim. 160; *Tylden v. Hyde*, 2 Sim. & St. 238; *Winston v. Jones*, 6 Ala. 556; *Mandlebaum v. McDonell*, 29 Mich. 78; S. C., 18 Am. Rep. 61; *Lippincott v. Lippincott*, 19 N. J. Eq. 121; *Bogert v. Hertell*, 4 Hill, 492; *Meakings v. Cromwell*, 2 Sand. 512; S. C., 5 N. Y. 136; *Jenkins v. Stouffer*, 3 Yeates, 163; *Foster v. Craige*, 2 Dev. & B. Eq. 209; *Vaughan v. Farmer*, 90 N. C. 607; *Lockhart v. Northington*, 1 Sneed, 318. There is some authority to the point that where the testator directs the proceeds of the sale of land to be distributed among certain objects or persons the fund does not go to the executor to distribute, and therefore he does not take the power to sell, but the heir alone can sell and make the distribution: *Allum v. Fryer*, 3 Q. B. 442, 446; *Foster v. Craige*, 2 Dev. & B. Eq. 209; *Bentham v. Wiltshire*, 4 Madd. 44 (see authority of this case doubted in *Forbes v. Peacock*, 11 Sim. 152; S. C., 12 Id. 528, 536); but see *Forbes v. Peacock*, *supra*; *Ward v. Devon*, *supra*; *Dorland v. Dorland*, 2 Barb. 63; *Vaughan v. Farmer*, *supra*; *Jenkins v. Stouffer*, 3 Yeates, 163, *supra*, and other cases cited *supra*.

The implication of a power of sale in the executors is, however, much strengthened by the circumstance that one or more of the executors are objects of the testator's bounty and are beneficially interested in the execution of the power: *Meakings v. Cromwell*, 2 Sand. 512; S. C., 5 N. Y. 136. And so where the will contained a direction to sell real estate for the maintenance and support of the testator's widow, and she was made executrix, she took a power of sale by implication over the decedent's realty: *Leonard v. American Baptist Home Mission Society*, 35 Hun, 290. But where lands are directed to be sold upon the death of the testator's widow, and she is appointed executrix, she has no implied power of sale, and cannot vest such a power in

her executor: *Walter v. Logan*, 5 B. Mon. 516. And where a testator directed that his entire estate, after the payment of his debts, should be kept together for the support, maintenance, and education of his children; that when either of his daughters became of age or married, she should have one-sixth part of the estate "converted into slaves and settled upon her to her sole and separate use"; and that as his sons severally became of age, their portions of the estate should "be paid to them in cash," — the executor had no power to sell the entire real estate when one or two of the children became entitled to their shares, for this would be contrary to the express terms of the will, which directed that his estate should be "kept together." The executor's implied power of sale extended no further than a power to sell one-sixth part of the estate as the several contingencies arose, "and that would be a sixth part previously separated and distinguished for that purpose": *Walker v. Murphy*, 34 Ala. 591, 594.

Under an implied power of sale, though the testator directs that the sale shall be made within a year from his death, it may be made after the expiration of a year, and such a provision is merely directory: *Hale v. Hale*, 187 Mass. 168.

In South Carolina, an executor takes no power of sale unless it is expressly given him, notwithstanding the will directs the lands of the estate be sold: *Drayton v. Drayton*, 2 Desaus. Eq. 250; but see *Boyd v. Satterwhite*, 10 S. C. 45.

CRITERION FOR DETERMINING WHETHER OR NOT EXECUTOR IS INVESTED WITH POWER OF SALE BY IMPLICATION, where a testator directs that his land be sold, but names no donee of the power, is whether or not the fund arising from the sale is distributable by the executor: See cases cited *supra*, and the principal case. The mere appointment of a person as the executor of a will that directs lands to be sold does not of itself confer upon him the power to sell. He becomes invested with this power only when he is directed by the will or is bound by law to see to the application of the proceeds of the sale or when the proceeds in their disposition are mixed and blended with the personalty which it is the duty of the executor to dispose of and pay over: *Lippincott v. Lippincott*, 19 N. J. Eq. 121; *Patton v. Randall*, 1 Jacob & W. 196. We have seen that, when the proceeds are directed to be applied to the payment of debts or legacies, the executor will receive the power of sale by implication, as this necessitates that the fund should pass through his hands; and that when the management of the fund arising from the sale is expressly confided to the executor, he also takes an implied power of sale: *Gray v. Henderson*, 71 Pa. St. 368; *Patton v. Randall*, 1 Jacob & W. 196. And likewise the executor takes the power by implication when the testator, in his disposition of his property, blends together the fund to be realized from the sale of the realty with the personal property, for the distribution of the personal property is the appropriate function of the executor, and the mingling of the proceeds of the realty with the personalty by the testator demonstrates clearly his intention that the whole fund should pass through the hands of the executor: *Lippincott v. Lippincott*, 19 N. J. Eq. 121; *Winston v. Jones*, 6 Ala. 550; *Gersen v. Rinteln*, 2 Demarest, 243; *Gray v. Henderson*, 71 Pa. St. 368; *Jenkins v. Stouffer*, 3 Yeates, 163; *Tylden v. Hyde*, 2 Sim. & St. 238; see *Greville v. Brown*, 7 Hoffm. L. Cas. 689; *Bench v. Biles*, 4 Madd. 187. Thus where a testator, after several devises and bequests, concluded: "The balance of my property to be applied to the payment of my just debts. Should there be a surplus, it is my will and desire that it be equally divided among the heirs of my deceased brother, S. F., and the heirs of D. C.," it was

held that as the "property" mentioned in the will was a mixed fund of real and personal estate, and was to be applied in the first place to the payment of debts, the executors had a power by implication to sell a tract of land not specifically devised for the payment of debts and for distribution: *Foster v. Craige*, 2 Dev. & B. Eq. 209.

So as distribution is the proper function of the executors, and not of the heir at law, if the testator leave a life estate, and at the death of the life tenant directs that the land be sold and the proceeds distributed in a specified way, the power of sale will go to the executor by implication: *Forbes v. Peacock*, 11 Mees. & W. 630; S. C., 11 Sim. 152; 12 Id. 528, 536; *Lloyd v. Taylor*, 2 Dall. 223; *Meakings v. Cromwell*, 2 Sand. 512; S. C., 5 N. Y. 136. The case of *Benthall v. Wilshire*, 4 Madd. 44, is contrary upon this proposition, but its authority is questioned in *Forbes v. Peacock*, 11 Sim. 152; 12 Id. 528, 536; see also *Curtis v. Fulbrook*, 8 Hare, 278; *Haydon v. Wood*, 8 Id. 279, note a.

But where the land directed to be sold is devised to devisees, this is regarded as an expression of intention on the part of the testator that the fund is not to be distributed by the executor, and the power of sale, if any there is, vests in the devisees or devisees: *Colyer v. Finch*, 5 Hoffm. L. Cas. 905; *Patton v. Randall*, 1 Jacob & W. 189; *Curtis v. Fulbrook*, 8 Hare, 278; *Haydon v. Wood*, 8 Id. 279, note a; *Grove v. Winter*, 5 N. J. Eq. 655; *Mapes v. Tyler*, 43 Barb. 421; *Dunn v. Keeling*, 2 Dev. 283; *Clark v. Riddle*, 11 Serg. & R. 311. Before an implication is raised there must be an absence of express devise, and in opposition to a devise it can never be raised. And a power of sale not expressly given to any one is not to be implied to the executors because the devisees of the estate are minors: *Patton v. Randall*, 1 Jacob & W. 196. So where there is a devise of the legal estate to a particular person, and the estate is charged with the payment of debts or legacies, the money must be raised through the instrumentality of the devisee, and he is the only person that can make a legal title: *Colyer v. Finch*, 5 Hoffm. L. Cas. 905. And where real estate was devised by the testator to his three children in fee-simple, to be divided between them or sold, as the majority of them could agree, there was no power raised by implication in the executors, either to sell or divide the real estate, but the power of sale was in the three devisees, and it was held that all must unite in making the sale or in effecting the partition, or resort for this purpose must be had to some judicial tribunal: *Grove v. Winter*, 5 N. J. Eq. 655; see also *Mapes v. Tyler*, 43 Barb. 421; but see *Gersen v. Rinteln*, 2 Demarest, 243. So where a testator devised all his estate, real and personal, to his wife during her natural life, after discharging all his lawful debts, and from and immediately after her decease he gave and devised of the same pecuniary legacies to different relations, the residue of his estate, whatever it might be, to be equally divided between two other relations, or the surviving heirs of each, it was held that the will gave no power to the executors to sell the real estate: *Clark v. Riddle*, 11 Serg. & R. 311.

But even here, if the intention of the testator was that the fund should be distributed by the executor, he will take the power by implication under a direction that lands be sold notwithstanding a devise: See *Mandlebaum v. McDonell*, 29 Mich. 78; S. C., 18 Am. Rep. 61; *Jenkins v. Stouffer*, 3 Yeates, 163. Thus where a testator divided his estate equally between his widow, son, and daughter, combining the entire property, real and personal, for the purposes of the division, and confided the whole to the control and management of his executor, who was to make no division, except as to the widow's share upon her request, until the daughter should attain the age of twenty-four years, the executor, upon the daughter reaching that age, took a power

of sale as to the land by necessary implication, notwithstanding the express devise to the widow and children: *Hollman v. Tigges*, 7 Atlantic Rep. 347 (N. J.).

SURVIVORSHIP OF POWER. — A mere direction in a will to the executors to sell lands, without any words vesting in them an interest in the land, or creating a trust, will constitute only a naked power, which does not survive, but when anything is directed to be done in which third persons are interested who have a right to call upon the executors to execute the power, such power survives: *Robertson v. Gaines*, 2 Humph. 378; *Peter v. Beverly*, 10 Pet. 532; S. C., 1 How. 134; see also the note to *Lockwood v. Stradley*, 12 Am. Dec. 102-104. Thus an implied power of sale to two or more executors may be executed by the survivors, if the others die before executing the power: *Anderson v. Turner*, 3 A. K. Marsh. 131; *Magruder v. Peter*, 11 Gill & J. 217; *Chandler v. Rider*, 102 Mass. 268; *Lloyd v. Taylor*, 2 Dall. 223. And so a deed from one of two executors, where the other has not qualified, is a valid execution of an implied power of sale: *Meakings v. Cromwell*, 5 N. Y. 136.

Where, if the power of sale were express, it might be exercised by the executor of the executor, the same rule will apply though the power vests by implication: *Sabin v. Hoape*, 27 Beav. 553; *Tainter v. Clark*, 13 Met. 220, 228; *Conklin v. Egerton*, 21 Wend. 430; 1 Sugden on Powers, 136. But the wife of the testator takes no power of sale, though she is appointed executrix of the will, where the will directs that the lands be sold upon her death, and she cannot therefore vest this power in her executor: *Walter v. Logan*, 5 B. Mon. 516; but see *Putnam v. Story*, 132 Mass. 205.

It is generally maintained, however, that the implied power of sale can never be executed by the administrator with the will annexed, at least without the assistance of a decree of court: *Dunning v. National Bank*, 6 Lana. 296; *Tainter v. Clark*, 13 Met. 220, 228; *Conklin v. Egerton*, 21 Wend. 430; *In re Clay*, 29 Week. Rep. 5. An active trust to invest, sell, and convey at discretion does not devolve upon him: *Stoutenburg v. Moore*, 37 N. J. Eq. 63. So where a testator devised lands to his wife for her life or widowhood, after her death or marriage to his son for life, and after the death of the son to be sold, and the proceeds divided among certain children, the direction for a sale could not be executed by the administrators *de bonis non cum testamento annexo*: *Chandler v. Delaplaine*, 4 Del. Ch. 503. But in *Putnam v. Story*, 132 Mass. 205, it was held that if a will provides that, after the decease of the testator's wife, who is the executrix, and to whom the use and income of his estate are given during her life, all the estate shall be converted into money, and does not in terms specify the person who shall do this, the power to sell the real estate left by the testator is by necessary implication given to the administrator *de bonis non* with the will annexed, as there is no other person to execute the power.

POWER OF SALE BY IMPLICATION FROM ACTS DIRECTED TO BE PERFORMED though no express direction for sale is made.

Charge of Debts on Land. — We have seen that where a testator directs that his land be sold for the payment of debts, the executor will take a power of sale by implication: See *Blatch v. Wilder*, 1 Atk. 420; *Newton v. Bennet*, 1 Bro. C. C. 135; *Magruder v. Peter*, 11 Gill & J. 217; *Foster v. Craig*, 2 Dev. & B. Eq. 209; 1 Sugden on Powers, 135, 137. At common law the real estate of a decedent could not be sold by the executor for the payment of debts, unless it was expressly charged for that purpose, since otherwise it descended to the heirs unaffected with any power in the executors, and the remedy of the creditors, if any, was against the heirs: See *Ticknor v. Harris*, 14 N. H. 272; S. C.,

40 Am. Dec. 186. But in England, when the will makes a general charge of the testator's debts upon the realty for such deficiency as the personal estate shall be insufficient to pay, the executors take an implied power of sale, since the proceeds are to pass through their hands in the execution of their office, and since, as the executors are to apply the fund, the testator must have intended them to raise it: *Robinson v. Lowater*, 17 Beav. 601; S. C. on appeal, 5 De Gex, M. & G. 272; *Colyer v. Finch*, 5 H. L. Cas. 905; *Hodkinson v. Quinn*, 1 Johns. & H. 303, 309; *Wrigley v. Sykes*, 21 Beav. 337; *Sabin v. Heape*, 27 Id. 553; *Gosling v. Carter*, 1 Coll. C. C. 644. And the same rule prevails in New Jersey: *Dewey's Ex'rs v. Ruggles*, 25 N. J. Eq. 35; *Haggerty v. Lanterman*, 30 Id. 37; but see *Des v. Allen*, 2 N. J. L. 45. But in New York this rule is not accepted, and it is held that a power to sell lands will not be implied in the executors from the fact that the lands of the testator are charged with the payment of debts: *In re the Will of Fox*, 52 N. Y. 530. And in England, in the case of *Doe v. Hughes*, 6 Ex. 223, the same rule was enunciated, but this case was afterwards doubted in *Robinson v. Lowater*, 17 Beav. 601. And the matter is now settled in England by the statute 22 & 23 Vict., c. 35, sec. 16, which provides that where there is a general charge of debts, and no distinct provision is made as to the person by whom the sale is to be made, then the executors take an implied power to sell for the payment of debts. But even under this statute an administrator will not take an implied power of sale: *In re Clay*, 29 Week. Rep. 5.

In *Gosling v. Carter*, 1 Coll. C. C. 644, the testator, after giving a general direction for payment of his debts, gave and bequeathed all his real and personal estates to his wife for life, and after her decease directed all his real and personal estate to be sold, and the proceeds divided among certain persons named, and appointed his wife and another his executrix and executor, and it was held that the intention of the testator was that the life estate of the wife should be subject to the payment of debts, and that the executrix and executor took an implied power to sell the real estate for this purpose; but the court would not compel the purchaser to take the title without the concurrence of the heir at law: See also *Cook v. Dawson*, 29 Beav. 123, 126, 127; S. C. on appeal, 3 De Gex, F. & J. 127, 128. A testamentary charge of real estate with the payment of debts generally authorizes a trustee, to whom, after imposing the charge, the testator has devised the land upon a trust for other persons, to sell or mortgage the land charged, and exempts the purchaser or mortgagee from liability to see to the application of the purchase or mortgage money: *Ball v. Harris*, 4 Mylne & C. 264.

Where the lands are devised, the executor will not take a power of sale, though annexed to the devise are the words "after all my debts are paid": *Dunn v. Keeling*, 2 Dev. 283. See also *Dewey's Ex'rs v. Ruggles*, 25 N. J. Eq. 35.

Assignment or Trust Deed for Payment of Debts. — An assignment or conveyance of personal or real property, or of real and personal property, gives the assignee or trustee of necessity a power of sale. The estate is vested in the trustee or assignee by the deed of the owner, and it is within the scope of his fiduciary authority to sell for the purposes of the trust: *Goodrich v. Proctor*, 1 Gray, 567; *Gould v. Lamb*, 11 Met. 84; *Stall v. Olmicknath*, 16 Ohio St. 169; *Williams v. Otey*, 8 Humph. 653; S. C., 47 Am. Dec. 632; *Cherry v. Greene*, 21 Rep. 373 (Ill.); *Wood v. White*, 4 Mylne & C. 481. A trust deed of real and personal property to pay debts, and for the support of the grantor's family from the income or principal as should be necessary, and for the accumulation and division of any surplus, gives the trustees power by implication to sell the real estate: *Cherry v. Greene*, 21 Rep. 373 (Ill.).

But an assignment that does not purport to convey land will not give the trustees a power of sale over it: *Baker v. Crookshank*, 1 Whart. Dig., 6th ed., Deb. & Cred. pl. 370. So an unsealed instrument conveying land in trust to secure the payment of a debt is not sufficient *per se* to authorize a sale and conveyance of the land by the trustee. The instrument creates merely an equitable lien upon the land, which may be enforced by a court of equity: *Linton v. Boly*, 12 Mo. 567. And so a conveyance of land in trust to pay out of the rents and profits the grantor's debts, and to support the grantor, his wife and children, and at his death to divide it among his children, gave no right to sell for the payment of debts, or for any purpose: *Mundy v. Vawter*, 3 Gratt. 518.

Implication of Power of Sale from Direction to Divide and Invest Property, etc. — No precise form of words is necessary to the creation of a power; if the intention to confer the power is apparent, to enable the executor to execute the trusts of the will, the power will be implied: *Winston v. Jones*, 6 Ala. 554. And any words which show an intention to create a power of sale, or any form of instrument which imposes duties upon a trustee that he cannot perform without a sale, will necessarily create a power of sale in the trustee: 2 Perry on Trusts, sec. 766; but see *Seeger's Ex'rs v. Seeger*, 21 N. J. Eq. 90. Thus, where the testator provides for an equal division of his property among his children upon the youngest attaining his majority, and the realty is not capable of advantageous partition, a power of sale over the realty will be conferred upon the executors by implication: *Geraca v. Rinteln*, 2 Demarest, 243. So where the testator directs that his estate, real and personal, be divided into seven parts and distributed to his seven children respectively, this gives the executors an implied power of sale: *Winston v. Jones*, 6 Ala. 550. In *Stewart v. Hamilton*, 37 Hun, 19, the testator, by the first clause of his will, gave and bequeathed to his executors all his property, both real and personal, of every name and nature, in trust for the purposes thereafter named. He then gave legacies to various persons, and then directed the residue of his estate to be divided equally among certain persons named; and the will also provided: "I enjoin my executors not to sell any of the real estate under three years, unless sold to advantage. Sold on time, if to advantage"; and it was held that an implied power to sell real estate was conferred upon his executors, and that the clause enjoining a sale for three years was not intended to suspend the power of alienation, but merely to allow the executors to hold the real estate for that time, if they thought best.

A bequest of an annuity payable out of lands gives the executor a power to dispose of the lands by sale or otherwise, adequate to the performance of the bequest: *Ex parte Elliott*, 5 Whart. 524; S. C., 34 Am. Dec. 572. So where the testator, after directing the payment of his debts and of some specific legacies, devised and bequeathed the residue and remainder of his estate, real and personal, to his executors in trust, to invest the same and pay the income to his wife during life, and at her death the balance to his heirs at law, it was held that a power to sell and convey the real estate of the testator by the executors is fairly to be implied: *Livingston v. Murray*, 39 How. Pr. 102. And so where property is given to executors in trust, to be equally divided among the testator's children, with a direction to pay the sons their shares, and to hold the daughters' shares, and pay them the income thereof in half-yearly payments for life, the executors have power to sell the testator's lands: *Belcher v. Belcher*, 39 N. J. Eq. 126. In *Ballantine v. Frelinghuysen*, 38 Id. 266, the testator authorized and empowered his executors to continue his

interest in two firms, of which the testator was a member, and to form the firms into a joint-stock company, and to receive and hold stock in the same, in the place and stead of his interests therein, for the benefit of his estate; and it was held that the executors were authorized to continue in the business of the firms all the property of the testator embarked therein at the time of his decease, including real estate owned by him individually and as a partner and that held by him in trust for the firm, and that the executors had power to act in forming a corporation, and to convey to the corporation the testator's interest in the firms, including the real estate. And so a power of sale is given to an executor by implication where the testator directs something to be done which necessarily implies that the realty is to be first sold. Thus, a direction to the executor to "collect" and "pay over" to certain persons, in trust for charitable purposes, the residue of the testator's realty and personalty, "without sacrificing too much by forcing the sale thereof," give a power of sale to the executor by implication: *Going v. Emery*, 16 Pick. 107; S. C., 26 Am. Dec. 645; but see *Seeger's Ex'rs v. Seeger*, 21 N. J. Eq. 90.

The rule as to other trustees is the same as that obtaining in respect to executors. Thus, where real estate was devised to a trustee, his heirs and representatives in trust, to invest and reinvest the same from time to time in stocks or other safe securities, and to pay over annually the income thereof, together with two hundred dollars of the principal to the testator's daughter during life, and after her decease to pay and transfer the whole of the trust fund to her children, the trustees by necessary implication had the power to sell the real estate discharged of the trust: *Purdie v. Whitney*, 20 Pick. 25. So in *Tait v. Lathbury*, L. R. 1 Eq. 174, a marriage settlement of personalty contained a power authorizing the trustees to sell the trust funds and invest in the purchase of real estate, and provided that the real estate so purchased should be considered as personal estate for the purposes of the settlement. Under this settlement, though it contained no express power of sale over the land so purchased, the trustees nevertheless had the power to sell it.

But where an estate was conveyed to a trustee in trust for a corporation, to be conveyed by him under the direction of the directors, and upon his failure to convey, they to appoint other trustees by deed, a deed signed by the president and directors conveyed no estate, though it recited that they were the successors of the trustee: *Bumgarner v. Cogswell*, 49 Mo. 259. A power to locate and survey land gives no power to sell; and an expression on the part of the donor that he would gladly sell part of the land at a low rate to procure money to defray the expense of the residue does not authorize the person to whom it is addressed to sell: *Moore v. Lockett*, 2 Bibb, 69.

GOUDY v. HALL.

[26 ILLINOIS, 512.]

ACTION OF COURT, WHEN COLLATERALLY CALLED IN QUESTION, will be referred either to its general or its statutory powers, as may be necessary to sustain its jurisdiction, and without reference to any such mere matter of form as the address of the petition.

ADMINISTRATOR'S NOTICE OF APPLICATION FOR ORDER OF SALE OF DECEDENT'S REALTY is sufficient, notwithstanding the objection that it was not dated, and no state was named, where the notice stated that the ap-

plication would be made "at the next term of the Fulton County circuit court, to be holden in Lewiston, on the second Monday in March next," and the notice was published in a newspaper printed in Lewiston, Fulton County, Illinois, the first publication being in October preceding the March term, when the petition was filed.

NO SPECIAL FORM OF NOTICE OF APPLICATION FOR ORDER OF SALE OF DECEDENT'S REALTY being given by statute, such notice is not to be subjected to hypercriticism; and the simple question is, Would any person reading it be advised of the time and place when and where the petition would be presented, and its objects?

PARTICULAR DAY IN TERM ON WHICH PETITION FOR LEAVE TO SELL DECEDENT'S REALTY will be presented need not be named in the administrator's notice thereof.

FAILURE OF GUARDIAN AD LITEM TO ANSWER FOR ONE OF INFANT HEIRS a petition for an order of sale of a decedent's realty does not affect the jurisdiction of the court to pronounce its decree, since jurisdiction of the persons is acquired by publication of the notice.

REVERSAL OF DECREE BY VIRTUE OF WHICH ADMINISTRATOR SOLD LAND does not divest title of a third person purchasing at the sale, or those claiming under him, if the court had jurisdiction of the parties and subject-matter.

WHERE COURT HAS JURISDICTION OF PARTIES AND SUBJECT-MATTER, acts performed and rights acquired by third persons under its judgment or decree, and while it remains in force, must be sustained, notwithstanding a subsequent reversal.

EJECTMENT, the question involved being the validity of an administrator's sale. The opinion states the case.

W. C. Goudy, pro se.

J. S. Bailey, for the appellee.

By Court, LAWRENCE, J. This is an action of ejectment, in which the plaintiffs below, who are also the plaintiffs in error, claimed title under the heirs of one John Fridley, deceased, and the defendant claimed under a deed from his administrator. The decree, by virtue of which the administrator sold, was afterwards reversed in this court upon a writ of error brought by the heirs. The case is reported in 25 Ill. 146. The case at bar depends, first, upon the character of the judicial proceedings anterior to the sale; and secondly, upon the effect of the reversal. The first point evidently resolves itself into a pure question of jurisdiction.

It is first urged by the counsel for the plaintiffs in error, that the petition for leave to sell was addressed by the administrator to the judge "in chancery sitting," and that therefore the question of jurisdiction is to be determined, not by the statute of wills, but by the general principles of chancery practice. The case of *Cost v. Rose*, 17 Ill. 276, cited in sup-

port of this position, was a proceeding in partition in regard to which the court had both a statutory and a general chancery jurisdiction, and the address of the bill was there held to indicate the intention of the party as to which jurisdiction he sought to call into action. But the court could not take jurisdiction of an administrator's petition of this specific character, and grant the particular relief sought, except by virtue of the statute, and the petition clearly shows it was the statutory power of the court that was invoked. Besides, the action of the court, when collaterally called in question, will be referred either to its general or its statutory powers, as may be necessary to sustain its jurisdiction, and without reference to such a mere matter of form as the address of the petition. Its jurisdiction depends upon weightier considerations. In this case, however, the address was not improper, because the jurisdiction invoked is of an equitable character, and this species of business is always transacted on the chancery side of the court.

The question then is, Did the court have jurisdiction under the statute? It is urged that the notice is insufficient because no state is named, and because the notice is not dated. The advertisement is as follows:—

"ADMINISTRATOR'S NOTICE.—Notice is hereby given to all persons interested in the estate of John Fridley, deceased, that application will be made at the next term of the Fulton County circuit court, to be holden in Lewiston, on the second Monday in March next, for an order for the sale of all or so much of the real estate of said deceased as will be sufficient to pay his debts, to wit [description of the lands]; when and where all persons interested may attend and show cause, if any they have, why said property should not be sold for the purposes aforesaid.

ABRAHAM MURPHY, Adm'r."

The words "state of Illinois" do not appear in the advertisement. It was, however, published for the requisite time in a newspaper printed in Lewiston, Fulton County, the first publication being in October preceding the term of the court when the petition was filed. No special form is given by the statute, and this notice is not to be subjected to hypercriticism. The simple question is, Would any person reading it be advised of the time and place when and where the petition would be presented, and its objects? The answer cannot be doubtful. The paper was published in Lewiston, Fulton County, in the state of Illinois. Could a person reading the advertisement suppose that "the Fulton County circuit court to be

holden in Lewiston," described in the advertisement, referred to some possible Fulton County in another state? And so of the date. Could the reader, finding this notice in a paper bearing date October 29, 1847, have any doubt but that "the next term" of the court, to be holden "on the second Monday of March next," referred to the month of March next after the date of the paper. It would be most unjust to overturn titles acquired by innocent purchasers at public sales upon such minute criticism. We have to consider whether the object of the law has been substantially attained, and whether a reasonable person, in the exercise of his ordinary faculties, reading this notice, would be apprised by it in what court and at what term the petition would be presented. Counsel do not object that no particular day in the term was named in the notice, nor do we deem that necessary, notwithstanding a possible inference to the contrary might be drawn from a casual expression in the opinion in the case of *Gibson v. Roll*, 30 Ill. 179.

It is also objected that the guardian *ad litem* did not answer for one of the infant heirs. This, however, does not affect the jurisdiction of the court. In the case of *Gibson v. Roll*, 27 Ill. 91, it is decided that jurisdiction of the subject-matter is acquired by filing the petition, and jurisdiction of the persons by publication of the notice. We entertain no doubt of the correctness of this decision. But in this case, after having thus acquired jurisdiction, the court did its duty by appointing a guardian *ad litem* for all the infant heirs, and the fact that this guardian failed to answer for one of them certainly did not take away from the court the power to pronounce its decree. The infant and the guardian were both in court, and that decides the question of jurisdiction, which alone we are now considering.

This brings us to the last question in this case, — the effect of a reversal of the decree. It is urged by the counsel for the plaintiffs in error that this destroys the title acquired by the sale, although the land was bought by a third person, and has since been several times transferred. The case of *Wambaugh v. Gates*, 8 N. Y. 138, is cited in support of this position. The point is not reasoned by the court in that case, but it seems to be taken for granted *sub silentio* that the title reverts on the reversal of the order of sale. Whether that may not depend upon some statutory provision of the state of New York we are not advised. We are certainly at a loss to imagine how the decision is to be sustained upon reason or principle. That

the title acquired by a third person through a sale under a general judgment and execution is not affected by a subsequent reversal of the judgment, is a principle of law too well settled to need the citation of authorities. Yet what difference is there, in principle, between that case and a sale by an administrator? In the one case, the sheriff acts under a general authority from the court to sell all the lands of the defendant that may be necessary to satisfy the debt. In the other, the administrator acts under a special order directing him to sell certain specified lands. But in both cases it is the exercise of a power, and in both cases this power rests upon precisely the same basis, to wit, the authority of the court. If the court has jurisdiction to render the judgment, or to pronounce the decree, that is, if it has jurisdiction over the parties and the subject-matter then, upon principles of universal law, acts performed and rights acquired by third persons under the authority of the judgment or decree, and while it remains in force, must be sustained, notwithstanding a subsequent reversal. The necessity of this rule, as founded upon important considerations of public policy, is too apparent to admit of dispute. Society should be able to rely upon the judgments and decrees of its courts, and although it knows that they are liable to be reversed, yet it has a right, so long as they stand, to presume they have been properly rendered. The contrary doctrine would be fatal to judicial sales, and to the marketable value of titles derived from them. The naked question of jurisdiction is generally of easy determination, but how rarely would the most accomplished lawyer, called upon to examine a title depending upon judicial proceedings, often long and intricate, be able to decide, with any certainty, whether or not a technical error has crept into the record! Questions similar in their general character have often been before this court, and it has inflexibly adhered to the rule we have expressed,—that when the validity of acts done under a judicial proceeding is collaterally called in question, we have to look only to the jurisdiction, and if that is found to have existed, then it matters not how erroneous the proceedings of the court may have been, the rights of third persons, acquired while such proceedings were unreversed, and by virtue of them, must be protected: *McLagan v. Brown*, 11 Ill. 523; *Young v. Lorain*, 11 Id. 637 [52 Am. Dec. 463]; *Iverson v. Loberg*, 26 Id. 179 [79 Am. Dec. 364]; *Stow v. Kimball*, 28 Id. 107; *Fitzgibbon v. Lake*, 29 Id. 165; *Goudy v. Hall*, 30 Id. 109;

McJilton v. Love, 13 Ill. 486 [54 Am. Dec. 449]; *Peak v. Shasted*, 21 Id. 137 [74 Am. Dec. 83]; *Grignon's Lessees v. Astor*, 3 How. 340.

We have only to say, in conclusion, that there is no class of public sales better entitled to a just degree of protection than those of administrators. Purchasers are not to be discouraged by the apprehension that through some slight defect of form they may lose both their land and their money, and their title remain beyond even the healing power of the statute of limitations, until the heirs attain their majority, and the time for bringing a writ of error has expired. A rule involving these consequences would be most injurious to infants, by leading inevitably to the sacrifice of so much of their real estate as the administrator might find it necessary to sell. No prudent man would buy, at a price approaching the value of the land, if he felt that his title was to depend upon the decision of a writ of error to be brought at some distant day. As the rule is now understood, although there are, undoubtedly, occasional instances of hardship, yet probably there is no other class of public sales of real estate in which there is so little sacrifice as in sales by administrators.

In confirmation of the views above expressed as to the intent of the legislature to uphold these sales, reference may be had to the 106th section of the statute of wills, which provides that if an administrator, professing to sell under an order of court, shall make such sale contrary to the provisions of this chapter, he shall incur a penalty of five hundred dollars, "provided, that no such offense shall be deemed to affect the validity of such sale." Although this doubtless refers to irregularities committed after the order of sale, yet the provision shows the desire of the legislature to give stability to this species of title.

Decree affirmed.

ACTION OF COURT, WHEN COLLATERALLY CALLED IN QUESTION, WILL BE REFERRED either to its general or its statutory powers, as may be necessary to sustain its jurisdiction, and without reference to any such a mere matter of form as the address of the petition. The principal case is cited to this point in *Hobson v. Ehoan*, 62 Ill. 153; *Nichols v. Mitchell*, 70 Id. 261. The judgment of a court having jurisdiction of the parties and subject-matter is presumed to be valid: *Hendrickson v. St. Louis etc. R. R. Co.*, 84 Am. Dec. 76, and note 78; *Young's Adm'r v. Rathbone*, 84 Id. 151.

FAILURE OF EXECUTOR OR ADMINISTRATOR TO GIVE PROPER NOTICE of application for order of sale of decedent's realty, whether invalidates sale: See *Gibbs v. Shaw*, 84 Am. Dec. 737; *Gibson v. Roll*, 83 Id. 181, and note 183.

FAILURE TO NAME COUNTY OR STATE, OR TO INSERT DATE in administrator's notice of application for leave to sell real estate does not invalidate it,

as the time and place may be ascertained from the newspaper in which the notice is published. The principal case is cited to this effect in *Moore v. Neil*, 39 Ill. 261; *Finch v. Sink*, 46 Id. 170; *Clark v. Marfield*, 77 Id. 263; *McNutt v. Turner*, 16 Wall. 365.

WHERE NOTICE OF APPLICATION FOR ORDER OF SALE OF LAND OF DECEDENT does not specify the day of the term on which the petition will be presented, it may be presented at any time during the term: *Cromine v. Tharp*, 42 Ill. 122, citing the principal case. See also *Gibson v. Roll*, 83 Am. Dec. 181, and note 183.

FAILURE OF GUARDIAN AD LITEM TO ANSWER FOR ONE OF MINOR HEIRS does not take away the jurisdiction of the court to decree a sale of the decedent's realty. The principal case is cited to this effect in *Gage v. Schroder*, 73 Ill. 47; *Madden v. Cooper*, 47 Id. 362. In *Gibson v. Roll*, 81 Am. Dec. 219, cited in the principal case, it is held that proceedings by an administrator to sell real estate bind infant heirs, though they are not nominally made parties to the proceedings.

SUBSEQUENT REVERSAL OF JUDGMENT WILL NOT DIVEST TITLE OF STRANGER who purchases at sale where the court had jurisdiction of the parties and subject-matter: *Jesup v. City Bank of Racine*, 82 Am. Dec. 703, and note 706; *McBride and Murphy v. Longworth*, 84 Id. 383; *Gosson v. Donaldson*, 68 Id. 723. The principal case is cited to this point in *Hobson v. Ewan*, 62 Ill. 155; *Feaster v. Fleming*, 56 Id. 460; *Moore v. Neil*, 39 Id. 262; *Wadhams v. Gay*, 73 Id. 422; *Madden v. Cooper*, 47 Id. 362. Where the court has jurisdiction over the parties and subject-matter, acts performed and rights acquired by third persons under the authority of its judgment or decree, and while it remains in force, must be sustained, notwithstanding a subsequent reversal: *Hobson v. Ewan*, 62 Ill. 155; *Feaster v. Fleming*, 56 Id. 460; *Carpenter v. Dexter*, 8 Wall. 531, citing the principal case. Society should be able to rely upon the judgments and decrees of its courts, and although it knows that they are liable to be reversed, yet it has a right so long as they stand to presume that they have been properly rendered: *Wadhams v. Gay*, 73 Ill. 422.

COURT ACQUIRES JURISDICTION OF SUBJECT-MATTER BY FILING OF PETITION of an administrator for leave to sell real estate, and jurisdiction of the person by publication of the notice, or by service of the notice, as provided by the statute: *Gage v. Schroder*, 73 Ill. 47, citing the principal case; *Gibson v. Roll*, 81 Am. Dec. 219.

FINDING OF COURT THAT DEFENDANTS WERE DULY NOTIFIED BY PUBLICATION will be sufficient evidence of that fact in all collateral proceedings unless the record shows something to the contrary. The principal case is cited to this effect in *Harris v. Lester*, 80 Ill. 316, 317. See also to the same effect *Morrow v. Weed*, 66 Am. Dec. 122; *Gibson v. Roll*, 81 Id. 219; *Gibbs v. Shaw*, 84 Id. 737.

FINDING OF COURT IS NOT VOID AND CANNOT BE QUESTIONED IN COLLATERAL PROCEEDING, no matter how erroneous it may be, provided the court had jurisdiction of the parties and subject-matter: *Hobson v. Ewan*, 62 Ill. 154; *Moore v. Neil*, 39 Id. 262, citing the principal case; *Young's Adm'r v. Rathbone*, 84 Am. Dec. 151, and note citing prior cases; *Bruce v. Cloutman*, 84 Id. 111; *Wimberly v. Hurst*, 83 Id. 296; *Sidensparker v. Sidensparker*, 83 Id. 527; *Finneran v. Leonard*, 83 Id. 665. So the erroneous action of an administrator, under a license to sell land, can amount to no more than an irregularity, which will be shielded by the confirmation from attack in a collateral action: *Osman v. Traphagen*, 23 Mich. 88.

BLACK v. HILLS.

[36 ILLINOIS, 376.]

PURCHASER OF LAND FOR VALUABLE CONSIDERATION WITH NOTICE OF PRIOR DEED for same land made by the grantor during infancy, but without notice of a subsequent ratification of that deed, will hold the land against the prior grantee.

ONE HAS AS PERFECT LEGAL RIGHT TO PURCHASE LAND which his grantor has conveyed during minority as to purchase land that has never been conveyed at all; and he is not to be denied the position of an innocent purchaser because he has notice of the deed made during minority

WHERE RATIFICATION OF INFANT'S DEED IS BY WRITTEN INSTRUMENT, it is within the policy of the registry laws; if by acts *in pais*, then a subsequent purchaser must be affected with notice of such acts.

POSSESSION OF LAND BY GRANTEE OF INFANT IS NOTICE of any acts of ratification.

BILL in equity to compel the conveyance of title to certain lands. The opinion states the case.

Hay and Skinner, for the appellants

Warren, Wheat, and Bailey, for the appellees.

By Court, LAWRENCE, J. The testimony in this case is somewhat contradictory, but we consider the following state of facts sufficiently proven:—

On the 13th of August, 1857, the appellee, Henry Hills, then a minor, sold and conveyed to Black, one of the appellants, two tracts of land, not adjoining each other, and described as the east half of the southwest and the north half of the northwest 31, 2 north, 1 west. Hills attained his majority on the 28th of September, 1858, and on that day executed to the appellants, Black and Farwell, his bond for the conveyance to them of the above-described lands, upon the payment of seventeen hundred dollars. At the same time that he executed this bond, he indorsed upon it a receipt for one thousand dollars paid by Black. It appears from the evidence that this receipt was in settlement of the transactions which had previously occurred between Hills and Black. In October, 1858, Hills executed one receipt for three hundred dollars paid by Farwell, and another for six hundred dollars paid by Black. On the 17th of October, 1858, Black took possession of the east half of the southwest 31, above described, but neither he nor Farwell has ever had possession of the other tract. The deed to Black, made while Hills was an infant, was recorded, but the bond to Black and Farwell was not.

On the 19th of October, 1858, the defendant Gammon bought of Hills both the above-described tracts, paid him a valuable consideration in property and money, and received a deed. We find nothing in the record showing that Gammon had any knowledge whatever of the previous transaction between Hills, Black, and Farwell, or that this purchase was made with any fraudulent intent. Hills received from Gammon a pair of mules, a carriage, and harness, valued at \$750, his note, and some money. The precise amount does not appear.

On the foregoing state of facts, the appellants filed their bill for a conveyance from Gammon to themselves of both tracts of land. The court below decreed a conveyance of the east half of the southwest 31, of which Black was in possession at the time of the sale by Hills to Gammon, but refused it as to the other tract. This refusal is now assigned for error.

It is urged by the counsel for the appellants, that when Gammon bought of Hills, he had constructive notice, through the record, that Hills, while a minor, had conveyed to Black, and that he bought with knowledge that such conveyance might be ratified, and subject to the chances of ratification. Expressed as an abstract proposition, this would imply that a written ratification by a grantor, after he reaches his majority, of a recorded deed made by him while a minor, need not be recorded as against a subsequent purchaser. No authority to this effect has been adduced, and we have searched the books in vain for the decisions of other courts upon this point. As a question of principle, we have little difficulty in saying that a subsequent purchaser, for a valuable consideration, will hold the land conveyed as against a ratification, by the grantor, of a deed made during his minority, of which ratification the subsequent purchaser has neither actual nor constructive notice.

The argument that the subsequent purchaser takes with knowledge that his grantor may have ratified, and therefore takes subject to that risk, would apply as well to all conveyances. For in every instance where a deed is made, the grantee knows that his grantor may have made a former conveyance, and it is precisely to protect the innocent purchaser against such chances that our registry laws are enacted. It can, in no just sense, be said that the grantee of a person who had conveyed during his infancy is not to be deemed an innocent purchaser, if he has notice of the first deed. He has as perfect a legal right to purchase land which his grantor had sold

during minority as he would have to purchase land that had never been conveyed at all. The moment the second deed is made, the deed made in infancy is disaffirmed, and becomes void. It is as if it had never been. This right of disaffirmance is necessarily given by the law to prevent great frauds. Yet the right would be practically of little value to the minor, if the person buying of him, after he becomes of age, is to be considered as incurring, in any way, the censure of the law, and to be therefore denied the position of an innocent purchaser. It does not devolve upon him to investigate whether, in the particular case, his grantor ought to disaffirm, as a question of morals between him and the first grantee. It is enough for him to know that the law gives the absolute right to disaffirm in every case, and he may presume that his grantor is exercising that right for reasons that would be as satisfactory in the forum of conscience as the act is valid in a court of law.

The deed of an infant may be ratified by a written instrument, or by acts *in pais*, or by long acquiescence. While it is true that the title, after ratification, is held, for most purposes, to relate back to the original deed, yet it is the ratification which is the effective act, and which rescues the deed from its liability, at any moment, to be made a nullity. We have no doubt that, if the ratification is by means of a written instrument, it is within the policy of the registry laws. It is the object of those laws to disclose to all the world the exact condition of a title, and written instruments relating to land, not appearing there, are to be taken as not existing, unless the knowledge of them is brought home in some other way. If the ratification is by acts *in pais*, then a subsequent purchaser must be affected with notice of those acts. Of course, possession by the first grantee would be notice, not only of the original deed, but of any acts of ratification.

If these principles are correctly laid down, this case has been rightly decided. It does not matter whether the instrument executed by Hills to Black and Farwell should be regarded as a ratification or a new sale. In the view we have taken of this case, the result would be the same. The appellants are entitled to a deed for the tract of which Black had actual possession at the date of Gammon's purchase. As to the other tract, the instrument of ratification being unrecorded, and neither Black nor Farwell being in possession, the title must be left in Gammon.

The case of *Ogden v. Haven*, 24 Ill. 59, depends upon quite other principles than those which control this case. There, there was actual notice to the subsequent encumbrancer.

Decree affirmed.

POSSESSION OF LAND PUTTING PURCHASER UPON INQUIRY AS TO OWNERSHIP THEREOF: *Blankenship v. Douglas*, 82 Am. Dec. 608, and note 613; *Dutton v. Warschauer*, 82 Id. 765, and note 776.

INFANT'S DEED IS DISAFFIRMED BY SUBSEQUENT CONVEYANCE OF SAME LAND BY HIM after attaining his majority: *Peterson v. Laik*, 69 Am. Dec. 441, and cases cited in the note 443; see also *Mustard v. Wohlford's Heirs*, 76 Id. 209, and note 217; *Harrod v. Myers*, 76 Id. 409, and note 418.

THE PRINCIPAL CASE IS CITED to the point that the deed of an infant may be ratified by acts *in pais* or by long acquiescence: *Keil v. Healey*, 84 Ill. 106; and also to the point that the registry laws were enacted for the complete protection of titles, and were intended to disclose their true condition. Hence, when the record shows the title to be in a particular person, purchasers have the right to regard him as the real owner: *Holbrook v. Dickenson*, 56 Ill. 500.

LEWIS v. HEADLEY.

[26 ILLINOIS, 432.]

LAW OF PLACE WHERE CONTRACT IS MADE GOVERNS PERFORMANCE of its terms and conditions as a general rule; but when it is to be performed at a different place and under a different jurisdiction from that where it was entered into, then the law of the place of performance must govern.

PARTIES TO AGREEMENT ARE PRESUMED TO KNOW LAW OF PLACE where performance is to be made, and to contract with a view to that law unless it is otherwise expressed in the contract, and this presumption is legal and irrebutable.

IT IS LEGAL PRESUMPTION THAT CONTRACT IS TO BE PERFORMED where it is made, unless it specifies a different place of performance.

NOTES AND CERTIFICATES OF DEPOSIT ARE GOVERNED BY LAW OF STATE where they are payable though given in pursuance of an arrangement made in another state.

PARTY TO CONTRACT WILL NOT BE HEARD TO SAY THAT HE WAS IGNORANT of the law of the state where the contract is to be performed, and it is error for the court to instruct in an action on such contract that the party should be shown to have knowledge of that law.

ASSUMPSIT by the defendant in error against the plaintiff in error on two promissory notes, one for two thousand and the other for eight thousand dollars, and both dated March 13, 1861, at Decatur, Illinois. The defense was that the consideration of the notes was bills of the Morris County Bank, of New Jersey, of a smaller denomination than five dollars, and designed for circulation in Illinois in violation of the law

of that state. It appeared that the notes were given as collateral security for bills of the Morris County Bank, of New Jersey, deposited by that bank or its agents in the Railroad Bank of Decatur, Illinois, which bank, it appeared, had failed and made an assignment for the benefit of creditors at the time of the execution of the notes. The whole amount of deposits made by the Morris County Bank was fifteen thousand dollars, and of that sum five thousand dollars were in five-dollar bills, and the remainder in bills of smaller denominations, all issued from the Morris County Bank. The contract to deposit this money in the Railroad Bank was made in New Jersey, and the money was sent to Decatur to the Railroad Bank by the Morris County Bank. After its receipt the Railroad Bank paid it out and received it in the course of their business until it ceased to circulate in Illinois. The jury found for the plaintiff in the sum of \$12,025. Defendant moved for a new trial and in arrest of judgment. These motions were overruled, and the court rendered judgment on the verdict, and the defendant now assigns error to the giving and refusing of instructions.

Nelson and Roby and Gallagher and Lake, for the plaintiff in error.

Moore and Greene, for the defendant in error.

By Court, WALKER, C. J. On the trial below, the court, on behalf of the plaintiff, instructed the jury that if they believed, from the evidence, that the indebtedness accrued from the Railroad Bank to the Morris County Bank, for its notes of a less denomination than five dollars, unless they further believed that the Morris County Bank was aware that it was a violation of the laws of the state of Illinois to circulate therein bills of that character, they should find for the plaintiff. Also, that if they believed from the evidence that the notes sued upon were given by plaintiff in error to secure a balance due from the Railroad Bank to the Morris County Bank, and he was at the time a principal shareholder in the former bank, then the consideration was sufficient.

These instructions were excepted to at the time they were given, and the errors assigned question their accuracy. The doctrine seems to be settled that, as a general rule, the law of the place where a contract is made must govern the performance of its terms and conditions. But when it is to be performed at a different place and under a different jurisdiction

from that where it was entered into, then the law of the place of performance must govern. And not only so, but the parties to the agreement are presumed to be informed in regard to the law of the place where performance is to be made, and to contract with a view to that law, unless it is otherwise expressed in the contract. And this is a legal presumption that cannot be rebutted. It is also a legal presumption that a contract is to be performed where it is made, unless it specifies a different place for the performance. Notwithstanding the arrangement was made in New Jersey, that the bills of the Morris County Bank should be deposited in the Railroad Bank, yet the bills were sent to Illinois by the former, and the certificates of deposit bear date at Decatur, and no other place being named, they were payable at that place. And the notes are also dated at Decatur, and are payable by operation of law at the same place. It then follows that as these bills were sent to Illinois and deposited, and the notes and certificates of deposit were made in this state, and payable here, the laws of our state must govern, and the Morris County Bank and its agents must be held to have contracted with reference to these laws.

The certificates were payable at the Railroad Bank on their return. And as the agents of the Morris County Bank have made the contract to be governed by the laws of Illinois, they will not be heard to say that they were ignorant of these laws. The court therefore erred in instructing the jury, that the evidence should show that they had knowledge of the law prohibiting the circulation of such notes, and that contracts of which they formed the consideration are prohibited. It was equally an error to amend the first instruction of plaintiff in error so as to assert the same rule, which we have seen is obnoxious, to the objection that the Morris County Bank should have had actual notice that the law prohibited the transaction. Although this is an ungracious defense, and is entitled only to such consideration as courts are compelled to give under the positive requirements of the law, still the instructions did not state the law correctly, and they for that reason may have misled the jury in finding their verdict, and we must therefore hold them to be erroneous. When such instructions have been given, we are compelled to reverse, and send the case to another jury.

For these reasons the judgment of the court below is reversed and the cause remanded.

Judgment reversed.

PROMISSORY NOTES ARE GOVERNED BY LAW OF PLACE WHERE THEY ARE PAYABLE: *Hunt v. Standart*, 77 Am. Dec. 79, and note 87.

LAW OF PLACE WHERE CONTRACT IS MADE GOVERNS IT unless it is to be performed in another place, when it is governed by the law of the latter place: *Ayer v. Tilden*, 77 Am. Dec. 355, and cases cited in the note 360; *Young v. Harris*, 61 Id. 170.

IT IS PRESUMPTION OF LAW THAT CONTRACT IS TO BE PERFORMED WHERE IT IS MADE: *Roundtree v. Baker*, 52 Ill. 245, citing the principal case; *Speed v. May*, 55 Am. Dec. 540; *Allshouse v. Ramsey*, 37 Id. 417.

THE PRINCIPAL CASE IS AFFIRMED AND FOLLOWED IN *Lewis v. Headley*, 28 Ill. 437.

KAUFMAN v. SMALLWOOD.

[36 ILLINOIS, 504.]

PURCHASER OF LAND AT SHERIFF'S SALE WHO RECEIVES PORTION OF REDEMPTION MONEY from the judgment debtor, and agrees to give him time for the payment of the residue, without stipulating that unless the residue be paid by a specified time he shall have the right to take out his sheriff's deed, so far waives his right to the sheriff's deed that he is not entitled to it if he neither tenders back the money received nor gives notice of his intention to rescind the contract, and take out a deed, unless the residue be paid within a reasonable time.

BILL in equity. A decree was rendered in favor of the complainant, and the defendants assigned error. The opinion states the case.

S. G. Malone, for the plaintiffs in error.

Nelson and Roby, for the defendant in error.

By Court, LAWRENCE, J. Price recovered a judgment against Smallwood, the defendant in error, in the circuit court of Macon County, in 1859. Execution was sued out, under which an undivided half of certain mill property was sold, and bid in by Price at the rate of seventy-seven dollars for each lot, making a total of about four hundred dollars. After the sale, and before the year for redemption had expired, Smallwood sold and conveyed his undivided interest in said property to John H. Kaufman, one of the plaintiffs in error, giving a deed of warranty, and taking back a mortgage to secure the unpaid portion of the purchase-money, amounting to seventeen hundred dollars. This was in September, 1860. In March, 1861, shortly before the expiration of the year for redemption, Smallwood entered into an arrangement with Price, by which he paid the latter \$255 towards the redemption of the property, and was to have a few days longer for the

payment of the balance. There was no stipulation that in the event of failure to pay the residue of the redemption money by any specified time Price should have the right to take out his sheriff's deed. Smallwood failed to pay, although several times requested by Price, and in September, 1861, the latter procured his deed from the sheriff, and advertised the property for sale. In the mean while, February 25, 1861, John H. Kaufman had sold the property to his co-plaintiffs in error, who were his sons and son-in-law. In October, 1861, Morthland, the son-in-law, in behalf of himself and his two brothers-in-law, J. G. and J. L. Kaufman, went to Price, made some threats about setting aside the sheriff's sale, and finally obtained a deed from him to themselves for the property in question, for which they paid him \$182. Smallwood learning this, filed his bill against Price, the Kauffmans, and Morthland to set aside the deeds from the sheriff to Price, and from Price to his co-defendants. The case was heard on proofs, and the court decreed in conformity with the prayer of the bill. This decree is now assigned for error.

It appears in the evidence that the mill property was worth from ten thousand dollars to eleven thousand dollars, and that John H. Kauffman was reputed insolvent.

We entertain no doubt as to the correctness of this decree. By accepting a part of the redemption money, with an agreement to give time for the residue, Price waived his right to a sheriff's deed. He might have made it one of the conditions of his arrangement with Smallwood that, unless the residue should be paid by a specified time, the deed might be still taken out. This, however, he did not do. Or under the arrangement actually made, it is probable he might have tendered back the \$255 received, with notice to Smallwood that unless the amount due should be paid within a reasonable time, he should hold the contract rescinded and take out the deed. Whether he could have revived his right to a deed on mere notice to Smallwood of his intent to rescind the contract, without tendering back the money, it is not necessary to inquire. Certain it is that without doing either one or the other, the procuring of a deed, and selling the title to the first comer for a consideration almost nominal was a summary disposition of the rights of Smallwood, which the law gave him no power to effect. It amounted to constructive fraud.

The only remaining question is as to whether the Kaufmans and Morthland, when they bought of Price, had notice of the

transactions between the latter and Smallwood. The evidence of Price, although he seems an unwilling or an unintelligent witness, taken in connection with the amount paid, and the relations of these parties to each other, leaves no reasonable doubt. Although the witness testifies that he could not remember that anything was said about the redemption money which had been paid by Price, yet he several times repeats that when Morthland came to him it was with an offer "to pay him the money that was back," amounting to \$182. This was for one half of a property worth from ten to twelve thousand dollars. The witness was reluctant to convey, but was pressed by threats from Morthland that they would set aside the sale. He finally conveys for the trifling consideration just named. This same undivided half of the property had been sold but a few months before by Smallwood to the elder Kaufman, and by the latter to his sons, Smallwood holding a mortgage upon it for seventeen hundred dollars against the elder Kaufman, and the latter being insolvent. It would be folly not to presume, in the presence of these circumstances, that when Morthland went to Price with his offer of the balance due, and with his knavish threats to set aside the sale if the latter would not convey, he had notice that Smallwood had paid a part of the redemption money, and what amount. It is difficult not to believe that the transaction was a clumsy fraud on the part of Morthland and the younger Kaufmans, attempted for the purpose of depriving Smallwood of the benefit of his mortgage lien:

The decree does exact justice to all parties. Price has received his money. The younger Kaufmans and Morthland are refunded the money they have paid, and Smallwood retains the benefit of his mortgage lien.

Decree affirmed.

ACCEPTANCE OF REDEMPTION MONEY INDUCED BY FALSE REPRESENTATIONS of the sheriff, that the law governing redemptions had been complied with, is not a waiver of the right to object to a non-compliance with the law, and on refunding or offering to refund the money, to hold the property free from such redemption: *Waller v. Harris*, 32 Am. Dec. 590. But a purchaser at an execution sale cannot have the redemption of the property set aside in equity on the ground of fraud while still retaining the redemption money: *Merry v. Bostonick*, 54 Id. 434.

THE PRINCIPAL CASE IS CITED to the point that where a purchaser at a sheriff's sale of lands accepts part of the purchase-money, under an agreement with the judgment debtor to pay the same, he waives his rights to enforce a forfeiture of the equity of redemption, and his interest in the land becomes a

more security for the balance of the purchase-money; he becomes an equitable mortgagee, with the right of redemption in the judgment debtor: *McCormick v. Greenhow*, 2 Utah, 369. So a mortgagee, though entitled to claim the fee under foreclosure proceedings, if he voluntarily accepts payment afterwards, thereby opens the foreclosure, and waives his right to insist upon it, and this principle is equally applicable to execution sales with respect to the right of redemption: *Whiting v. Butler*, 29 Mich. 133.

LUNN v. GAGE.

[37 ILLINOIS, 19.]

COVENANTS ARE TO BE CONSTRUED TO BE DEPENDENT OR INDEPENDENT, according to the intention of the parties and the good sense of the case.

COVENANTS BY LESSEE TO PAY RENT, AND BY LESSOR TO MAKE IMPROVEMENTS AND REPAIRS, without which the premises would be useless for the purposes leased, are mutual and dependent, and the lessor's failure to perform his covenant within a reasonable time, where no time is specified, justifies the lessee in abandoning the premises; but the lessee is liable for the rent for the time he occupied, less the damages sustained by him by reason of the improvements and repairs not having been made.

COVENANT BY LANDLORD TO MAKE IMPROVEMENTS AND REPAIRS SHOULD BE PERFORMED WITHIN REASONABLE TIME, where no time is specified, and the tenant has entered.

COVENANT by George W. Gage against William Lunn and William H. Lunn, for the rent due on a lease from April 1 to November 15, 1861. The plaintiff had leased to the defendants certain premises in the city of Chicago, known as the Brighton House, for five years from April 1, 1861, at the rate of one thousand dollars a year, payable quarterly. The lease provided that the rent should commence September 1, 1861, but that if the lessees should vacate the premises on or before April 1, 1862, the rent should commence April 1, 1861. The lessees covenanted, among other things, to pay the rent, and the lessor covenanted, as more fully stated in the opinion, to paint the outside of the house, and to construct a suitable horse-shed, and cause to be put down a side-track upon the premises. The defendants went into possession in April, 1861, but abandoned the premises on or about November 15th of the same year. The plaintiff failed to paint the house, or to erect a horse-shed and side-track. The hotel was constructed for the entertainment of cattle-drovers, and without the improvements which the lessor had agreed to make, was useless as a hotel, and of little or no value, but with the improvements the house might have done a good business. The court instructed the jury, at the request of the plaintiff: 1.

That under the lease the defendants had the right to vacate the premises the next day after they entered into possession, and in such a case the plaintiff could only recover at the rate of one thousand dollars a year, from April 1, 1861; and if the jury believed that the defendants vacated the premises on or about November 15, 1861, they were chargeable under the lease at the rate of one thousand dollars a year from April 1, 1861, together with interest from the time they vacated the premises, deducting therefrom the damages, if any, sustained by them from the failure of the plaintiff to fulfill the covenants made by him; and 2. That if the defendants have not notified the plaintiff to make the improvements specified in the lease, prior to the time they vacated the premises, then the jury might consider whether the defendants were entitled to any reduction of damages by way of recoupment. The court also instructed the jury, on behalf of the defendants: 1. That on the question of damages the jury must examine all the facts, and it is for the jury to say, from such facts, what damages the defendants had sustained; and 2. That if the plaintiff neglected to make the improvements for an unreasonable time, and for want of the improvements the defendants suffered damages, the amount of the damages was a proper offset to be allowed on the rent due, and if it equaled or overrun the amount of rent due, the jury should find for the defendants. The jury found a verdict for the plaintiff for \$275. A motion by the defendants for a new trial was overruled, and the court gave judgment on the verdict. The defendants thereupon appealed.

Garrison and Blanchard, for the appellants.

Kales and Williams, for the appellee.

By Court, WALKER, C. J. Had appellant a right to abandon the contract and remove from the premises after taking possession under the lease? The grounds relied upon are, that appellee had failed to erect a horse-shed, a side-track, or paint the house, according to his covenant in the lease. It is insisted that without these improvements and repairs the property was useless as a hotel, and of little or no value; but with the improvements, the house could have done a good business. The abandonment of the premises is sought to be justified upon the ground that the performance of these covenants were conditions precedent, and a failure by the lessor to make them released the lessees from their covenants.

The covenants referred to are these: "And it is further covenanted and agreed by and between said parties, that the said party of the first part shall paint the outside of the house situated upon said premises, and known as the Brighton House; also to construct a suitable horse-shed, to occupy the position of the former one, and also to cause to be put down a side-track upon said premises."

There is no time specified when these acts shall be performed, nor does it appear from the lease that they were to precede other acts to be performed by either of the parties. It will not be doubted that the parties supposed that these improvements and repairs were necessary for the better enjoyment of the property for the purposes for which it had been designed. If necessary for the enjoyment of the property as a hotel, it must be intended that they were designed by the parties for the benefit of the lessee during the term. Nor can we, for this reason, suppose that if it was only expected that it would be made at or near the end of the term that these covenants would have been inserted in this lease. It was manifestly to enhance the value of the property as a hotel, during the term, that they were to be made, and if so, it would seem to follow that it was designed they should be made at least in a reasonable time.

The true rule for construing covenants is stated in *Davis v. Wiley*, 3 Scam. 234. It is there said that "covenants are to be construed to be dependent or independent, according to the intention of the parties and the good sense of the case; and that technical words should give way to such intention." Testing these covenants by this rule, we must hold that they were mutual and dependent. And there being no stipulation that they were to be performed by appellee before appellants entered into possession under the lease, and as they were necessary to the more profitable enjoyment of the lease, and it was no doubt so understood by the parties, they should have been performed in a reasonable time; and if they were not, appellee had no right to recover: *Capps v. Smith*, 3 Scam. 177; *Baird v. Evans*, 20 Ill. 29. Again, in the case of *Mecum v. Peoria and Oquawka Railroad Co.*, 21 Id. 533, it was held that "courts will not and ought not to construe covenants and agreements as independent, and still enforce a performance by the other party, unless there is no other mode of construing the instrument, and unless it clearly appears to have been the deliberate intention of the parties at the time the instrument was executed." In this

case there is nothing to show, or from which it can be inferred, that appellants should occupy the premises at the stipulated rent in the condition they were when leased, and that appellee should have the entire term within which to make the improvements.

It would be a more rational and natural construction to say that it was designed that they should be made before appellants entered. But they having gone in without insisting upon them as precedent, we must suppose that they were understood to be mutual, and to be performed in a reasonable time. To hold that appellee had the entire term to make the improvements and repairs would be so manifestly unjust that we cannot imagine that the parties would deliberately enter into such an agreement. But if such was their purpose, they have failed to express it in the lease. Had appellee made the improvements before appellant abandoned the property, it would have been in time, as that would have been the construction put upon the covenants by the parties themselves.

We said, in *Wright v. Lattin*, 38 Ill. 293, that it may be, if the landlord covenants to repair before the term commences, and fails to do so, the tenant might refuse to enter upon the premises. But having entered under the lease, and received possession, he cannot abandon the lease and refuse to pay rent because of the breach of that or any other covenant, except for quiet enjoyment. If the landlord fails to repair according to his covenant, the tenant may recoup the amount of damages thus sustained from the rent, or he may sue upon the covenant.

It then follows that as appellants entered upon the term, and enjoyed the premises from some time in the month of April until in November, 1861, they became liable to pay rent for the time they thus occupied the premises. But they were also entitled to recoup all damages which they sustained by reason of the repairs not having been made by appellee. By appellee's second instruction, the jury were informed that such were their liability and their rights under the lease, and the jury seem to have acted under this instruction. Appellants seem to have been in possession for between six and seven months, yet the jury only found them liable to pay \$275, less than half of the rent stipulated to be paid by the terms of the lease. The jury could not have arrived at this conclusion had they not deducted the damages sustained by reason of the repairs not having been made, as they were authorized to do under the instruction. We think the instructions fairly presented the law of the case to the jury, and that the evidence warranted

their finding. We perceive no error in this record, and the judgment of the court below must therefore be affirmed.

Judgment affirmed.

COVENANTS OF TENANT TO PAY RENT AND OF LANDLORD TO REPAIR OR MAKE IMPROVEMENTS, WHETHER DEPENDENT OR INDEPENDENT. — It seems to be the generally accepted view of the authorities in which the question has been presented, that if a landlord covenants to repair or to make improvements, the tenant might refuse to enter until the covenant was performed, and would not be liable on his covenant to pay rent; but that if he entered and occupied, he would be liable for the rent, notwithstanding the repairs or improvements were not made, and his only remedies would be to bring an action against the landlord for the breach of the landlord's covenant, or to recoup his damages in an action by the landlord for the rent: *Kelsey v. Ward*, 38 N. Y. 83; *Wright v. Lattin*, 38 Ill. 293, 296; *Hill v. Bishop*, 2 Ala. 320; *Elbridge v. Osborn*, 12 Wend. 529; *Allen v. Pell*, 4 Id. 506; *Tibbitts v. Percy*, 24 Barb. 39; *Spreckles v. Sax*, 1 E. D. Smith, 253; *Leavitt v. Fletcher*, 10 Allen, 119, 121; *Surplice v. Farnsworth*, 7 Man. & G. 576; and see Taylor's Landlord and Tenant, sec. 331; 1 Washburn on Real Property, 4th ed., 491; 5th ed., 522; compare *Barnes v. Strohecker*, 21 Ga. 430. In Denalow's annotated edition of the Illinois reports, the editor, in a note to the principal case, says: "A valid distinction probably exists between repairs rendered necessary by contingencies which happen, as fire, etc., during the term, and improvements which the landlord agrees in the lease to make, by putting on the premises certain things not *in esse* when the lease is made. In the former case the tenant is put in possession of the thing demised, and the landlord's duty having once been fully performed by putting the tenant in possession of the entire thing demised, the making of the repairs subsequently rendered necessary could not be regarded as a condition precedent to the accruing rent. In the latter case the landlord never puts the tenant into possession of the entire thing demised. Hence there is a virtual suspension of the agreement on both sides, which renders the covenants mutual. The landlord agrees to improve if the tenant will enter and occupy; the tenant agrees to pay rent if the landlord will improve. The court says, in the above opinion, that the covenants of the plaintiff and defendants are in themselves mutual and dependent; i. e., that the lessee need not have entered until the improvements were made; but the tenant by entering waives this dependency, and consents to give the landlord a reasonable time in which to perform his covenant to improve. This renders them mutual, but not dependent. The tenant is held by the judgment for a portion of the rent, though the landlord made no improvements. This is virtually holding the covenants to be independent, but that if the landlord's remedy on the covenant to pay rent, though not dependent on his having made the improvements, is subject to the tenant's right to recoup damages for the failure of the landlord to improve. Were the landlord's remedy dependent on his making the improvements, he could recover nothing until the improvements were made."

THE PRINCIPAL CASE IS CITED in *Leavers v. Cleary*, 75 Ill. 353, to the point that the construction of the parties to a contract, as shown by their acts, may be resorted to as a means of determining their true intention at the time the contract was executed; and in *Peck v. Brewer*, 48 Id. 63, as recognising the doctrine that recoupment will be allowed whenever an action for damages arising out of the subject-matter of the action can be sustained by the defendant; and see *Streeter v. Streeter*, 43 Id. 162.

IVES v. MILLS.

[37 ILLINOIS, 73.]

MORTGAGEE OF HOMESTEAD ACQUIRES NO RIGHT TO ENFORCE HIS MORTGAGE, in Illinois, if the mortgage, executed while the premises were occupied as a homestead, contains no waiver of the homestead, by reason of the fact that the premises are afterwards exchanged for other lands, and the owner leaves the premises, but they are subsequently reconveyed to him, and he returns thereto, on ascertaining that the title to the exchanged lands is defective.

BILL in chancery, by Gideon Ives and Elmore Dennison, to foreclose a mortgage, made April 9, 1859, by the defendants, Hiram Mills, and his wife, Martha A. Mills. The premises mortgaged were occupied as a homestead at the time, and the mortgage contained no waiver of the homestead right. On November 11, 1859, the defendants conveyed the premises to Russ and Lyman Scudder, in exchange for eighty acres of land in Nebraska, the deed, likewise, containing no release of the homestead, but the Scudders verbally agreed with Mills and wife to pay off the mortgage. Mills and his family continued to reside on the premises until the spring of 1860, when, for the purpose of giving the Scudders possession, they removed to the country, where Mills rented a farm. Mills desired the Nebraska land to improve and make himself a home, but he did not immediately move to or take possession of it, because he was not able to do so. In August or September, 1861, the premises were reconveyed to Mills by the Scudders, for the reason that the title to the Nebraska land was found to be defective. A decree was rendered for the defendants, and the complainants sued out a writ of error.

George C. Campbell, for the plaintiffs in error.

By Court, **BREESE, J.** The facts in this case are, that the defendant in error, being indebted to Ives and Dennison, to secure the same, on the ninth day of April, 1859, executed and delivered to them a mortgage on lot three (3), in block fourteen (14), in Turner's addition to the town of New Boston, in the county of Mercer. It was the homestead of Mills, and the mortgage contained no waiver of it. Mills and his family continued to reside on the premises until in the spring of the following year, when he removed to the country and rented a farm. In November previous, Mills sold to or exchanged with one Scudder the premises for eighty acres of land in the territory of Nebraska, but on ascertaining the title was de-

fective, the contract was rescinded in August or September, 1861.

The plaintiffs now insist that the defendants in error cannot claim the benefit of the homestead act, by reason of this sale to Scudders; and though the contract was rescinded, they were not thereby rehabilitated to their former rights.

In one of the first cases decided by this court, under this homestead act, we held that an abandonment of the homestead will not be presumed from the fact that the head of the family has gone in search of another home, and being disappointed, returns to the old home: *Kitchell v. Burgwin*, 21 Ill. 40. In what way could the mortgage affect this right? What rights did the mortgagees acquire by this sale to Scudders? Did they acquire any they did not possess before the sale? We think not; and as the defendant in error had the capacity to sell and convey his homestead free from the mortgage, the mortgage not containing any relinquishment of the homestead right, could not affect this right. It was inoperative as to it. The principles of the case of *Green v. Marks*, 25 Id. 221, are applicable to this case, and must control it. The verbal agreement to pay the mortgage was not made to the mortgagees, and was not binding; and when the lot was reconveyed such agreement was virtually rescinded, and by the reconveyance the defendant in error was put in the position he occupied before he conveyed.

The judgment of the court below is affirmed.

Judgment affirmed.

LAWRENCE, J., having tried the cause in the court below, took no part in this decision.

ABANDONMENT OF HOMESTEAD, WHAT CONSTITUTES: See *Caboon v. Muligan*, post, p. 247, and the note thereto.

MORTGAGE OR CONVEYANCE OF HOMESTEAD MUST BE ACCORDING TO STATUTE, TO BE BINDING: *Poole v. Gerrard*, 65 Am. Dec. 481, and note discussing the subject; *Stewart v. Mackey*, 67 Id. 609; *Revalk v. Kraemer*, 68 Id. 304; *Dickson v. Chorn*, 71 Id. 382; *Grapengether v. Fejervary*, 74 Id. 336; *Brewer v. Wall*, 76 Id. 76; *Best v. Allen*, 81 Id. 338; *Larson v. Reynolds*, 81 Id. 444; *Sharp v. Bailey*, 81 Id. 489; *Hoskins v. Litchfield*, 83 Id. 215; *Pardee v. Lindley*, 83 Id. 219; *Burnap v. Cook*, 85 Id. 507. The principal case is referred to in *In re Poleman*, 9 Nat. Bank. Reg. 378, on the question of waiver of the homestead under the Illinois statute.

CONWAY v. CABLE.

[37 ILLINOIS, 82.]

LEGISLATURE CANNOT DIVEST INDIVIDUAL OF VESTED RIGHT, although it may require the performance of an act in the future, and declare that its omission shall subject an individual to a penalty.

LEGISLATURE CANNOT VALIDATE INVALID TAX SALE by a subsequent law.

OWNER OF LAND INCURS NO FORFEITURE BY PERMITTING HIS LAND TO BE SOLD FOR TAXES in a manner not according to law. The purchaser at a tax sale is bound to see that all of the essential requirements of the law have been performed before he can acquire title.

STATUTES SHOULD BE CONSTRUED, IF POSSIBLE, TO HAVE PROSPECTIVE RATHER THAN RETROSPECTIVE OPERATION, where they would impair the validity of contracts or divest the rights of property.

BILL in chancery to set aside a tax deed. The bill alleged irregularities in the assessment and in the proceedings to enforce it, and also alleged that a fraudulent combination had been entered into between the officials and the purchasers at the tax sale, by which the latter were required to pay only a portion of the delinquent taxes at the time of purchasing the lands. The defendants admitted that there were defects, but claimed that the defects were cured by the acts of February 22 and February 21, 1861. The bill was dismissed, whereupon the plaintiff brought this writ of error.

J. B. Hawley, B. C. Cook, and Charles M. Osborn, for the plaintiff in error.

George W. Pleasants, for the defendants in error.

By Court, **WALKER, C. J.** It being admitted that the sale was insufficient to pass title or to constitute a defense to the bill, the question is presented whether a defense is given by either of those acts. The act of the 22d of February, 1861, in terms fully ratifies and confirms the arrangement entered into by the officers and the purchasers at the sale. It also declares that sales made and certificates given shall not be construed to be invalid, by reason of the arrangement, by the failure of purchasers to pay the amount of their bids otherwise than as contemplated by the arrangement. It will be seen that the arrangement, at the time it was entered into, was illegal and without warrant of law. If, therefore, it has any validity, it must be by reason of this enactment. But few principles are better settled than that the legislature is powerless to divest, by enactment, an individual of a vested legal right. That laws, prospective in their character, enjoining the performance

of an act, and declaring that its omission shall subject the person omitting the duty to a penalty, is clearly within the legislative power, is equally true. And that the legislature may pass a law authorizing sales for taxes subsequently made to be on credit, there can be no doubt.

In such a case as the present, however, it seems to us there can be no doubt that a citizen may permit his real estate to pass to sale for delinquent taxes, and rely upon the want of compliance with the law authorizing a sale. He, by the law then in force, incurred no forfeiture by permitting his lands to be struck off at a sale for taxes not conducted according to law. The purchaser was bound to see that all of the essential requirements of the law had been performed before he could acquire any title at a tax sale. This proceeding, by which an individual is deprived of his property in a summary mode, and usually for but a trifling part of its value, has always been held to require a strict compliance with the provisions of the law authorizing the sale. No one can imagine that were a sheriff to sell real estate without a judgment or an execution, that the legislature could afterwards impose such a condition upon the owner before he could make a defense to a suit for the recovery of the land. To do so would be to transfer, by legislative enactment, the property of one person to another. We are unable to see any difference between an invalid sheriff's and an invalid tax sale. As well might the legislature attempt to impose conditions upon the assertion of title by a person who had executed a void deed, when sued for the recovery of the land. Such legislation, under our form of government, has always been supposed to be unwarrantable, as being opposed to the principles of natural justice, and depriving persons of their property contrary to due course of law.

In the case of *Marsh v. Chestnut*, 14 Ill. 223, a construction was given to two acts amendatory to the revenue laws. The act of 1849, which was under consideration, declared that all assessments of property for taxes, made in the year 1848 and previous years, and which were not completed within the time required by law, should be as good, valid, and effectual as if made and returned in strict conformity to law. The court held that this enactment did not, in anywise, affect sales for taxes made previously to the passage of the law. The amendatory act of 1851 declared that when a county or township assessor had heretofore failed, or should hereafter fail, to complete his assessment in the time required by law, such failure should

not vitiate such assessment; but declared it as valid and legal as if completed in the time required by law.

This latter act was also held prospective in its operation. And the court say that unless it is imperatively demanded, the acts in question should not receive a construction giving them a retrospective operation. "They were passed long after the proceedings in the case were concluded. Laws of such a character ought not to have a retrospective operation. Under the law in force when the proceedings were had, the purchaser at the sale acquired no title to the land. The assessment being invalid, there was no foundation to support the subsequent proceedings. The owner had a perfect defense to any claim of title under them. He had only to point out the defect of the sheriff's deed. But if the provisions of these statutes are to retroact upon the proceedings, the case is entirely changed. What before was insufficient to pass title became competent for the purpose. . . . Legislation of this kind may well be characterized as replete with injustice." The same rule was distinctly announced in the case of *Thompson v. Alexander*, 11 Ill. 54, upon a careful review of the authorities.

In all civilized governments, laws impairing the validity of contracts, and divesting the rights of property, are considered unjust and odious. And such enactments never receive such a construction, unless required by the language, when so plain as to admit of no other interpretation. In the case under consideration, the transaction was complete before the law was adopted, and the answer may have relied upon the defects, which are admitted to have existed, but are claimed to have been cured by the act of the 22d of February, 1861. To give it force, therefore, would be to transfer the property of the former owner, not by force of a valid and binding sale for taxes, but by the declared will of the legislature, that his title should pass from him, and vest in the purchaser at a tax sale, which conferred no right. This the legislature have not the power to do, whether by direct and positive action, or by rendering valid and binding acts which were nugatory.

In the act of the 21st of February, 1861, no language is found applying in terms its provisions to previous sales. It relates to deeds made after the adoption of the law, but does not otherwise refer to previous sales, and hence we must conclude that it was only designed to apply to sales subsequently made, otherwise different language would have been employed. It may be so construed as to give it full effect, and have only

a prospective operation. And we can hardly suppose that a different design operated upon the general assembly in the adoption of the law. But to impose new terms and conditions, after the sale has been made, is so unjust that we cannot believe the legislature would attempt to do so, even if it had the power. If they may impose these conditions to such a sale, they may impose others destructive to the rights of the owner, or they may impose them in any other case, as a condition upon which the party having a perfect right may interpose a defense. But when such a law is prospective in its operation, all persons have the opportunity of avoiding its operations.

The cases of *Marsh v. Chestnut*, 14 Ill. 223, and *Thompson v. Alexander*, 11 Id. 54, are in point, and settle this question. The court below, therefore, erred in dismissing the bill, and the decree must be reversed and the cause remanded.

Decree reversed.

RETROSPECTIVE OPERATION WILL NOT BE GIVEN STATUTE unless the intention to give it such operation is clearly expressed: *Seamans v. Carter*, 82 Am. Dec. 696, and note collecting prior cases. The principal case is cited to this point in *Dobbins v. First Nat. Bank*, 112 Ill. 566; and it is also cited in *Little v. Herndon*, 10 Wall. 31, as holding that the Illinois statute of February 21, 1861, is not retrospective.

LEGISLATIVE POWER TO SUPPLY DEFECTS IN ASSESSMENTS FOR TAXES: See *People v. Seymour*, 76 Am. Dec. 521, and note discussing the subject at length.

MORRIS v. HOGLE.

[57 ILLINOIS, 150.]

EXECUTOR'S SALE AND CONVEYANCE OF REAL ESTATE IS VOID AND WILL BE SET ASIDE, where the executor gives notice to the heirs that he would apply at a certain term of the court for a license to sell, but he makes no application at that term, and without further notice applies at a subsequent term.

PETITION BY EXECUTOR TO SELL REAL ESTATE SHOULD STATE NAMES OF HEIRS, but, it seems, this defect cannot be taken advantage of in a collateral proceeding.

DECREE AUTHORIZING EXECUTOR TO SELL SO MUCH REAL ESTATE AS HE MAY DEEM FOR BEST INTEREST OF ESTATE IS ERRONEOUS. The court is only authorized to license a sale of so much real estate as is necessary to pay debts.

BILL in chancery. The facts are stated in the opinion.

John Clark, for the plaintiffs in error.

George B. Joiner and James Fletcher, for the defendants in error.

By Court, WALKER, C. J. The bill in this case was filed for the purpose of canceling a sale and conveyance made by an executor, under a decree of the county court of Iroquois County, as well as subsequent conveyances of the land. The bill makes the executor, and the persons to whom the subsequent conveyances had been made, parties defendant. On the hearing, the prayer of the bill was granted, and all of the conveyances in the chain of title from the executor were set aside and canceled, and the complainants restored to their former rights in the lands.

In this case, the main question is, whether the county court had jurisdiction of the parties as well as of the subject-matter of the suit. In all judicial proceedings, to render the judgment or decree binding upon parties, the court must be invested with jurisdiction. And if the parties are not before the court, there can be no power to bind them, by decree or otherwise. A defendant must have notice of the pendency of the proceeding, and a reasonable opportunity to be heard in defense of his rights before they can be affected by the decree. The court must, likewise, have jurisdiction of the subject of litigation, or the power to adjudicate and determine the question in dispute will be wanting. If the court lacks such jurisdiction, its proceedings are void, and binding upon no person; but may be questioned in any proceeding, whether direct or collateral.

This bill alleges that the heirs had no notice of the application of the executor to the county court for a license to sell the real estate of the testator for the payment of debts. The proceedings on that application were read in evidence on the hearing, from which it appears that the executor gave notice in a newspaper that he would apply at the December term, 1854, of the county court for leave to sell the lands of the testator. It also appears that the petition was not filed until the February term, 1855, at which time an order of sale was rendered in accordance with the prayer of the petition. It nowhere appears that any notice was given by publication, or was served upon the heirs, that an application would be made at the February term; but it was admitted on the hearing that no other notice was given than that the application

would be made to the December term. It was likewise proved that no petition was filed at the December term by the executor.

In the case of *Turney v. Turney*, 24 Ill. 625, it was held that where an administrator fails to make application at the term to which he has given notice, he cannot, without a new notice, apply and procure an order of sale at a subsequent term. That, failing to file his petition at the term to which he gave notice to the heirs to appear, the suit thereby became abated, and the parties in interest must be again brought into court before any steps can be taken to affect their rights. If the suit is abated, the parties will not afterwards be in court for any purpose until again served, and the court cannot have jurisdiction of the persons of the defendants to render a valid decree. Again, in the case of *Pardon v. Dwire*, 23 Id. 572, it was held that the rendition of a judgment on a service insufficient for the want of the requisite length of time before the return day, and which failed to show that it was served on the defendant, was utterly void: *Schnell v. Chicago*, 38 Id. 382. These cases are conclusive of the cause under consideration. Here, there was no service, or pretense of service, to the term at which the petition was filed and the decree rendered. Whilst the law guards the rights of *bona fide* purchasers at judicial sales with scrupulous care, it will protect owners from being deprived of their property by proceedings unauthorized by law. Executors are not permitted to apply for, nor are courts authorized to decree, a sale until the parties in interest have been brought into court, and had the opportunity of being heard in defense of their rights.

The law presumes that a purchaser inspects the public records, through which title must be derived, before he receives a conveyance. If he did so in this case, he saw that the decree of the court was unwarranted, and that a sale under it could pass no title. If he failed to examine the record, it was his own fault, and he should suffer the consequences of his negligence. For the want of the notice, the decree of the county court was a nullity, and a purchase under it passed no title.

It is also urged that the county court failed to acquire jurisdiction, because the names of the heirs and persons in interest did not appear in the petition or notice. Nor do they, in fact, appear anywhere in the entire proceeding. This may be error, for which such an order would be reversed on error, but we

are not prepared to hold that for that reason the court failed to acquire jurisdiction. In the case of *Stow v. Kimball*, 28 Ill. 93, the court inclined to hold that such an omission did not affect the jurisdiction.

The decree rendered at the February term being inoperative and void, the subsequent decree rendered at the May term, 1856, did not remove any of its imperfections. It, like the former decree, was made without any notice to the heirs, who, never having been in court, could not be bound by it. It was also erroneous to license the executor to sell so much of the lands of the heirs as he might deem for the best interest of the estate. We are aware of no statute or principle of the common law which has invested the executor with such a large discretion, or which authorizes the court to confer it upon him. The testator could have given him the power by his will, but he withheld it. The court, under the law, was only authorized to license a sale of so much as was necessary to pay debts, and it was manifest error to go beyond its provisions.

It was also contended that the executor was guilty of fraud, in conducting the sale, as well as the purchaser and his grantees, which requires that the sale should be set aside, and the conveyances canceled. But, inasmuch as the record is voluminous, and the abstract so imperfectly prepared as not to present the question, we decline its discussion. All of the purchasers, whether immediate or remote, are chargeable with notice of the want of jurisdiction of the county court to render the decree, as they could not trace title to its source except through this proceeding. And for the want of jurisdiction they acquired no title; but as their conveyances operate as a cloud on the title, complainants have a right to have it removed. The decree of the court below is affirmed.

Decree affirmed.

EXECUTOR'S OR ADMINISTRATOR'S SALE IS VOID, IF PROPER NOTICE BE NOT GIVEN: See *Doe ex dem. Mitchell v. Bowen*, 65 Am. Dec. 758; *Valls v. Fleming*, 61 Id. 566; *Root v. McFerrin*, 75 Id. 49; *Gibson v. Roll*, 81 Id. 219; S. C., 83 Id. 181, and the notes to these cases; and see *Haynes v. Meeks*, 70 Id. 703. If notice of an application by administrators to sell the lands of the estate to pay debts is not served or given in the mode required by statute, the decree of sale will be void, and may be questioned in both direct and collateral proceedings: *Haywood v. Collins*, 60 Ill. 337, citing the principal case.

PETITION BY EXECUTOR OR ADMINISTRATOR TO SELL DECEDENT'S REAL ESTATE, WHAT TO CONTAIN: See *Stuart v. Allen*, 76 Am. Dec. 551; *Gregory v. Taber*, 79 Id. 219, and the notes thereto. The omission to name the heirs in the petition will not invalidate the decree of sale: *Hobson v. Ewan*, 62 Ill. 152, citing the principal case.

THE PRINCIPAL CASE IS CITED in *Bostwick v. Skinner*, 80 Ill. 158, to the point that it is not an objection to the decree of sale that the heirs were not named in the notice published by the administrator for the purpose of obtaining the decree; in *Long v. Thompson*, 60 Id. 29, to the point that in a bill for distribution all the distributees must be parties; in *Rafferty v. Mallory*, 3 Biss. 363, to the point that all persons are bound to take notice of the records in foreclosure proceedings; in *Chicago etc. R. R. v. Kennedy*, 70 Ill. 362, 363, to the point that the law presumes that a purchaser inspects the records through which title must be derived before receiving a conveyance, and he is chargeable with all that appeared therein; and it is referred to in *Ex parte Bryan*, 14 Nat. Bank. Reg. 81, on the point that although the confirmation of a sale in bankruptcy be regular and unassailable, it cannot give effect to a sale made under a void decree.

CABEEN v. MULLIGAN.

[57 ILLINOIS, 230.]

HOMESTEAD IS ABANDONED, so as to be subject to sale under execution, when the husband removes from the premises with his family to another state, where he resides for two years, and declares before leaving that if he liked the country, and could do well in his business, he would remain, but if not he would return, and after his return he declares that when he left he expected to remain, but found it to his interest to return.

ACTUAL RESIDENCE IS REQUISITE TO PROTECT HOMESTEAD FROM SALE UNDER EXECUTION, as a general rule; although it is not essential under all circumstances.

IT IS EVIDENCE OF ABANDONMENT OF HOMESTEAD, if the husband removes from the premises with his family to another state, where he remains for two years.

BILL in chancery to set aside a sheriff's sale and deed of a certain lot in the town of Keithsburg, Illinois. From the pleadings and the agreed statement of facts it appeared that the complainant, Cabeen, had occupied the premises in question, with his family, as a homestead. About June 1, 1857, Cabeen leased the premises, and removed with his family to Minnesota, where they resided for two years, after which they returned and occupied the premises. Before he left for Minnesota, he stated that if he liked the country, and could do well in his business, he would remain, but if not he would return. After his return he stated that when he left he expected to remain in Minnesota, but found it to his interest to return to Keithsburg. On September 12, 1858, a judgment was recovered in the circuit court against Cabeen, on which an execution was issued November 10th, and the premises sold to the plaintiffs in execution. On December 14, 1858, the defendant, Mulligan, recovered a judgment before a justice

of the peace against Cabeen, and on February 8, 1859, he filed a transcript thereof in the office of the clerk of the circuit court, and on the following day issued an execution, under which the premises were afterwards sold and conveyed to him, he having redeemed the lot from the previous sale. The bill was dismissed with costs, and the complainant brought error.

H. M. Weed, for the plaintiff in error.

J. R. and J. N. Bassett, for the defendant in error.

By Court, WALKER, C. J. This record presents a question of fact for determination. It is, whether plaintiff in error abandoned his homestead, so that a judgment previously recovered, and under which a sale had been made, and a transcript of a judgment before a justice of the peace, became valid liens upon the homestead. Up to the time plaintiff in error moved to Minnesota, the premises were undoubtedly protected from sale under execution by the operation of the homestead law. But he left his home and removed with his family to Minnesota, and with them resided there for two years. He stated before leaving the state that if he liked the country, and could do well in his business, he would remain; but if not, he would return. And after he came back to his former residence, he stated that when he left he expected to remain in Minnesota, but found it to his interest to return to Keithsburg. From these statements it is manifest that he left with the design of remaining, and of abandoning his former home. He says he expected to remain in Minnesota.

Whilst this court has held that an actual residence is not, under all circumstances, essential, yet as a general rule it is requisite to protect the homestead from sale on execution. To carry out the object of that statute it may become necessary, when the husband is dead, and especially so when both parents have died, and the children, entitled to the benefit of the law, are of tender years, that a residence by a tenant may be substituted for an actual occupancy by the widow or the children. But it is only in such cases, and under peculiar circumstances, that the actual residence of the person claiming the benefit of the act can be dispensed with.

This was the rule announced in substance in *Walters v. People*, 21 Ill. 178, and *Kitchell v. Burgwin*, 21 Id. 40. It was, however, said that we could lay down no rule to govern such cases, but each case must depend upon its own peculiar cir-

cumstances, so that among them no evidence shall be found of an abandonment of the husband and family.

In this case, we think that a removal by himself and family, for the period of two years, to another state, and ceasing to occupy the premises, was evidence of an abandonment by the owner of his right to claim the homestead. This, we think, is true, without reference to what he said before or after his return. That could not change the question of whether he had ceased to reside upon the place. His intention may have been a material question, as to whether he had ceased to be a resident of the state, but could not operate upon the question of whether he had ceased to occupy his homestead. If he might remove his family and effects to another state, and remain there with them for two years, and still claim his former residence as exempt from sale under the homestead law, we are at a loss to conceive how long an abandonment it would require to subject it to the payment of his debts. To permit such an abandonment, without rendering the property liable to forced sale, would be to enable debtors to perpetrate frauds upon their creditors that could not have been designed by the general assembly when the act was adopted.

The judgment of the court below must be affirmed.

Judgment affirmed.

LAWRENCE, J., having tried the cause in the court below, took no part in this decision.

ABANDONMENT OF HOMESTEAD, WHAT CONSTITUTES: See *Taylor v. Hargous*, 60 Am. Dec. 606, and note discussing the question; *Walters v. People*, 65 Id. 730; *Taylor v. Bouhware*, 67 Id. 642; *Shepherd v. Cassidy*, 70 Id. 372; *Tumlinson v. Swinney*, 76 Id. 432; *Guid v. Guid*, 76 Id. 441; *Moore v. Dunning*, 81 Id. 301; *Fyffe v. Beers*, 85 Id. 577; *Ives v. Mills*, ante, p. 238. The principal case has been frequently approved on the point that where the husband removes from the homestead with his family, and acquires another home, the homestead right is lost: *Timan v. Moore*, 43 Ill. 174; *Maher v. McConaga*, 47 Id. 394; *Buck v. Conlogue*, 49 Id. 394; *Cahill v. Wilson*, 62 Id. 139; *Fisher v. Cornell*, 70 Id. 217; *Cobb v. Smith*, 88 Id. 202.

ACTUAL RESIDENCE IS NECESSARY TO PROTECT HOMESTEAD FROM SALE UNDER EXECUTION: *Taylor v. Hargous*, 60 Am. Dec. 606, and note; *Hoyt v. Howe*, 62 Id. 705, and note; *Charles v. Lamberson*, 63 Id. 457, and note; note to *Pryor v. Stone*, 70 Id. 347; *Dickson v. Chorn*, 71 Id. 382; *Tumlinson v. Swinney*, 76 Id. 432; *Christy v. Dyer*, 81 Id. 493; *Tillotson v. Millard*, 82 Id. 112; and see *Ackley v. Chamberlain*, 76 Id. 516; *Fogg v. Fogg*, 77 Id. 715; but a temporary absence, not designed as an abandonment, will not work a forfeiture: *Taylor v. Bouhware*, 67 Id. 642; *Franklin v. Coffee*, 70 Id. 292; *Pryor v. Stone*, 70 Id. 341, and note; *Shepherd v. Cassidy*, 70 Id. 372; *Tumlinson v. Swinney*, supra; *Guid v. Guid*, 76 Id. 440.

SAYLOR v. DANIELS.

[57 ILLINOIS, 381.]

MAKER OF NOTE IS ENTITLED TO CREDIT FOR USURIOUS INTEREST PREVIOUSLY PAID BY HIM, as against the payee or an indorsee who did not take the note for a valuable consideration, where the note represents the balance on a loan originally made at a usurious rate of interest, the payments in the mean time having been applied first on the usurious interest and then on the principal,

INDORSEE OF NOTE AS COLLATERAL SECURITY FOR PRE-EXISTING DEBT IS HOLDER FOR VALUABLE CONSIDERATION, but only to the extent of such debt.

ASSUMPSIT. The facts are stated in the opinion.

Hurd, Booth, and Kreamer, for the appellants.

Garrison and Blanchard, for the appellees.

By Court, LAWRENCE, J. This was an action brought by Daniels against Saylor upon a promissory note, to which Saylor pleaded usury. It was proven that four hundred dollars had been first loaned at fifteen per cent interest, and payments made from time to time, and new notes given, all in continuation of one transaction, the note sued on being the last. The payments made had been applied first in extinguishment of the interest, and then in reduction of the principal. The plaintiff had a verdict for \$277.32.

The court below refused to apply upon the existing note the payments formerly made upon the usurious interest. This was error. While it is the rule of this court that usurious interest once paid voluntarily cannot be recovered back, yet that rule does not apply where the transaction has not been settled, and the lender brings his action for the recovery of an alleged balance. In such case the borrower may defend by claiming a credit for whatever usurious interest he has paid in the same transaction. This is not using the usury law as a sword, but strictly as a shield. The fact that new notes have from time to time been given does not change the case. The court looks at the substance, not at the form. When the four hundred dollars was loaned in this case, it continued one transaction until paid, without reference to the number of balances struck and new notes given, and until fully paid, the borrower may insist upon having past usurious payments legally applied: *Hadden v. Innes*, 24 Ill. 381.

In this case the original loan was made by Barber, but when he took the last note, he took it in the name of Mar-

tin and Wright, and afterwards procured their indorsement. So far as appears, they only allowed Barber to use their names, and therefore the court should not have instructed that it was necessary to connect them with the usurious transaction. That assumes that they were *bona fide* payees of the note, which is at least doubtful, and should have been left to the jury.

But the note before it fell due was indorsed by Barber to the plaintiff, Daniels, to collect in payment of a debt due him from Barber, which the latter swears was about one hundred dollars, and to account to Barber for the residue. If Daniels took the note as collateral security for a pre-existing debt, he is a holder for a valuable consideration: *Manning v. McClure*, 36 Ill. 490. He would be so, however, only to the extent of the debt due him from Barber, and as to the residue of the note the same defense can be made as if it had not been assigned to Daniels.

Judgment reversed.

DEBTOR MAY INSIST UPON DEDUCTION OF USURIOUS INTEREST PAID, so long as any part of the debt remains unpaid: *House v. Davis*, 60 Ill. 370; *Mitchell v. Lyman*, 77 Id. 531; *Reinback v. Crabtree*, 77 Id. 187; *In re Prescott*, 5 Biss. 524; S. C., 9 Nat. Bank. Reg. 386, all citing the principal case. But see *Smith v. Stoddard*, 81 Am. Dec. 778.

TAKING NEGOTIABLE PAPER AS COLLATERAL SECURITY FOR PRE-EXISTING DEBT, WHETHER TAKING FOR VALUE: See *Roeborough v. Messick*, 67 Am. Dec. 346, and note; *Ruddick v. Lloyd*, 83 Id. 423.

ILLINOIS CENTRAL INSURANCE COMPANY v. WOLF.

[57 ILLINOIS, 354.]

ACKNOWLEDGMENT IN POLICY UNDER SEAL OF PAYMENT OF PREMIUM IS CONCLUSIVE, and the insurance company cannot show by parol that the premium was not in fact paid, but that a note was taken therefor, and the note not having been paid, the policy was void under a condition therein to the effect that where a note is taken for the premium the policy shall be void, unless the note is paid at maturity.

COVENANT. The facts are stated in the opinion.

Gallagher, Moore, and Green, for the appellant.

Tipton and Benjamin, for the appellee.

By Court, LAWRENCE, J. This was an action of covenant brought by the appellee upon a policy of insurance. The policy, which was under seal, admitted the receipt by the

company of the premium. The case was tried in the court below without a jury, and on the trial the appellant sought to prove by parol that although the policy admitted the payment of the premium, yet it was not in fact paid, but a note at sixty days was taken therefor. It was insisted, said note not having been paid, that the policy was void under one of the conditions therein, to the effect that where a note is taken for the premium, it shall be considered a cash payment, provided it is paid when due, but if not paid when due, the policy shall then be void. The appellee objected to this proof as in itself incomplete, and also on the ground that the company had waived whatever right it might have had to declare the policy void. The court rejected or disregarded the evidence offered, and gave judgment against the company.

The only point made by the appellant's counsel, in their printed brief, relates to this ruling of the court. They insist that the recital in a deed of the payment of the consideration is only *prima facie* evidence of such payment, and may be contradicted or explained, and cite *Ayers v. McConnel*, 15 Ill. 230, and *Kimball v. Walker*, 30 Id. 482. All that the court held in these cases was, that parol evidence might be received for the purpose of contradicting the acknowledgment in a deed of payment of the consideration, where the object and effect of such evidence were not to vary the legal import of the deed. For example, in a deed for the conveyance of lands, the recital of payment of the consideration may be contradicted, provided it is not sought by such evidence to impair the effect of the deed as a conveyance. But we know of no case, nor do we think any can be found, in which it has been held that the acknowledgment of payment may be contradicted by parol for the purpose of making the deed null. This very distinction is taken in the case of *Kimball v. Walker, supra*. Now, in the case at bar, if the evidence offered by the company were admitted, the effect would be to change an absolute policy of insurance, running for five years, and good upon its face, into one expiring in sixty days from its date. The policy admits expressly the payment of the premium, which, together with a certain deposit note for a larger amount, according to the usual mode of mutual companies, made the insurance good for five years. This is simply destroying the legal purport of a deed by parol proof, and would be in violation of the radical principles of evidence.

In addition, it may be said, that public policy forbids that

policies of insurance should be destroyed in this way. When the insured property is afterwards encumbered, it is common to assign the policy to the encumbrancer. In the event of a loss, however, as the policy is not a negotiable instrument at law, the encumbrancer must sue in the name of the assured, which would let in all defenses that could be made if the policy had never been assigned. The consequence then would be, if the rule contended for by the appellant were to obtain, that instruments good upon their face, and upon the faith of which money is often loaned, would be suddenly found, when brought into use, to be tainted with a secret defect that would make them nullities, although in the hands of an equitable assignee. This should not be permitted.

It has been held in other states that insurance companies cannot contradict the receipt of the premium contained in the policy for the purpose of avoiding it: *Goit v. National Protection Ins. Co.*, 25 Barb. 189; *New York Central Ins. Co. v. National Protection Ins. Co.*, 20 Id. 468; 3 Kent's Com. 280.

Judgment affirmed.

INSURANCE COMPANY'S POWER TO AVOID POLICY BY CONTRADICTING RECITAL THEREIN THAT PREMIUM HAS BEEN PAID. — The courts of Illinois have steadily adhered to the doctrine announced by the principal case, that where a policy of insurance recites the payment of the premium, the insurance company will not be permitted to contradict such recital for the purpose of rendering the policy invalid: *Providence L. Ins. Co. v. Fennell*, 49 Ill. 180; *Graff v. Simmons*, 58 Id. 443; *Teutonia L. Ins. Co. v. Mueller*, 77 Id. 22; *Teutonia L. Ins. Co. v. Anderson*, 77 Id. 384, 386; and see *Mutual L. Ins. Co. v. French*, 30 Ohio St. 253; and other courts assert the same rule: *Michael v. Mutual Ins. Co.*, 10 La. Ann. 737; *Consolidated etc. F. Ins. Co. v. Cashow*, 41 Md. 59, 77; *Goit v. National Protection Ins. Co.*, 25 Barb. 189; *New York Central Ins. Co. v. National Protection Ins. Co.*, 20 Id. 468; *Madison Ins. Co. v. Fellows*, 1 Dian. 217; *Dabell v. Mair*, 1 Camp. 532; but in *Southern L. Ins. Co. v. Booker*, 9 Heisk. 606, it was held that "where the policy has been delivered unconditionally and without fraud, acknowledging upon its face the payment of the premium, the company are estopped to deny the payment as a ground of forfeiture, but may show the fact, in order to collect the same, or deduct it from the amount of the policy recovered." This distinction seems to be sound if the recital in a policy of the payment of the premium is placed upon the same footing as the recital of the consideration in a deed of land. The weight of authority, however, does not appear to observe any such distinction, but regards the recital in the policy as a mere receipt, like any other, which is *prima facie* evidence of payment, but only *prima facie*, and which may be contradicted for any purpose: 1 Phillips on Insurance, sec. 512, 515; May on Insurance, secs. 359, 584; Bliss on Insurance, sec. 376; *Bergson v. Builders' Ins. Co.*, 38 Cal. 541; *New England M. L. Ins. Co. v. Hasbrouk*, 32 Ind. 447, 449; *Union Insurance Co. v. Grant*, 68 Me. 229, 230; *Pitt v. Berkshire L. Ins. Co.*, 100 Mass. 500, 504; *Sheldon v. Atlantic F. & M. Ins. Co.*, 26 N. Y. 460;

S. C., 84 Am. Dec. 213; *Baker v. Union M. L. Ins. Co.*, 43 N. Y. 283; *Thompson v. American etc. Ins. Co.*, 46 Id. 674, 676; *Robert v. New England M. L. Ins. Co.*, 2 Disn. 106, 113; *Insurance Co. v. Smith*, 3 Whart. 520, 529; *Trey F. Ins. Co. v. Carpenter*, 4 Wis. 20.

THE PRINCIPAL CASE IS CITED in *Morris v. Tillson*, 81 Ill. 616, to the point that the recital of the consideration in a deed of land may be contradicted, provided it is not sought by the evidence offered for that purpose to impair the effect of the deed; and see also, to substantially the same effect, *Richardson v. Oles*, 8 Ill. App. 97.

AUSTIN v. UNDERWOOD.

[87 ILLINOIS, 423.]

MONEY PAID FOR LAND BY THIRD PERSON DIRECTLY TO GRANTOR FOR GRANTEE IS PURCHASE-MONEY, AS AGAINST HOMESTEAD RIGHT of the grantee.

DEED OF TRUST HAS PRECEDENCE OVER HOMESTEAD RIGHT, where it is substituted in place of a mortgage to secure the purchase-money.

SALE UNDER DEED OF TRUST TO SECURE PURCHASE-MONEY OF HOMESTEAD PASSES TITLE TO PURCHASER, although the deed secures other indebtedness, if the homestead claimant does not pay or tender that portion which is purchase-money.

EJECTMENT by Edward W. Austin against Alexander H. Underwood. The facts are stated in the opinion.

M. Sylvanus Wilcox, for the appellant.

Plato and Smith, for the appellee.

By Court, BREESE, J. This was an action of ejectment in the common pleas of the city of Elgin, in the county of Kane, brought by appellant against appellee, for the northeast fraction of the southwest quarter of section 29, township 42 north, in range 8 east, containing fifty-five and a half acres, a timber lot adjoining, containing four (4) acres, and another piece, adjoining on which the defendant's house and buildings were situated in which he lived, containing twenty-one (21) acres. Trial by jury, and verdict and judgment for the defendant, and an appeal to this court.

The appellant claimed title to the premises by purchase, under a trust deed executed April 4th, 1858, by appellee and wife, to J. C. Austin, to secure five promissory notes executed to E. W. Austin, of even date with the trust deed. Default having been made, the trustee, J. C. Austin, after due notice, sold the land to E. W. Austin in three separate parcels; the piece containing fifty-five and a half acres for the sum of

\$526.09; the four-acre tract for \$45.60; and the tract containing twenty-one acres for \$568.22,—in all amounting to \$1,189.91. The proceedings under the trust deed are all regular, but there was no release of the homestead right by appellee to the trust deed. It was proved appellee had a small house and barn on the twenty-one-acre tract, and lived on it August 11, 1858,—had lived there with his family six or eight years; in 1854 or 1855, appellee purchased the fifty-five-acre tract, and the four-acre tract of Dibb, and since that time has occupied the whole farm; all the three pieces of land adjoining one another, and worth ten or twelve dollars per acre; appellee had worked the Dibb tract, but no one had lived on it since Dibb sold to appellee and left.

The appellant then read in evidence a certified copy of a mortgage deed, dated March 31, 1855, executed by appellee and wife to the appellant, reciting that he was indebted to appellant in the sum of \$987.40 by his five notes of even date, one of them due one year after date, and four payable yearly thereafter, at ten per cent, payable annually; and to secure the payment of these notes, appellee granted, bargained, and sold to appellant the fifty-five and twenty-one acre pieces of land. In this mortgage there was no power of sale or release of the homestead. It was duly acknowledged and recorded.

On the 11th of August, 1858, appellant released this mortgage to appellee, which release was acknowledged August 11 and recorded September 3, 1858.

The appellant also proved by Thomas Dibb and Mary Dibb, that she, being the owner of about sixty acres of land in the town of Dundee in Kane County, which, it is not denied, is the fifty-five and a half and four acre pieces, conveyed the same to appellee by deed, executed in March, 1855; that appellant paid the whole consideration, being about nine hundred dollars in gold; when the land was sold to appellee he said appellant would furnish the money, and appellee would secure him by a mortgage on the land; appellee never paid the Dibbs anything for the land; he never had the money in his hand, and had nothing to do with paying the money; the entire consideration money was paid by appellant.

One Hewet testified that he bought land of appellee in 1857, for which he paid four hundred dollars, a part of which, being \$330, he paid to appellant; at that time appellant said appellee owed him between three and four hundred dollars, but don't know whether he meant to say that was all appellee

owed him, or all that was then due him; from 1855 to 1857, appellee had no means except what he raised on the farm, and that was not more than enough to support his family.

The question arising on these facts is, Was this money thus paid by appellant purchase-money? if it was, a homestead right cannot, under the statute, be set up against the recovery.

We said in the case of *Eyster v. Hatheway*, 50 Ill. 521, that money borrowed of a third person, and paid out by a purchaser of land, cannot be regarded as purchase-money. It is the common understanding of the term "purchase-money" that it means money paid for the land or the debt created by the purchase.

In that case the money was borrowed to pay a pre-existing debt; in this case the land was purchased with the money of appellant, and actually paid over by him for the land, not one dollar of it passing through the hands of appellee, and the entire consideration of the indebtedness was the deed to appellant.

This case is therefore clearly distinguishable from that, for here the entire consideration for the fifty-five and a half acres passed directly from the appellant to Dibbs, and the deed executed to appellee on the understanding he was to give appellant a mortgage on all his land to secure the payment. This, it appears, he did do, which appellant, about the time of the execution of the deed of trust, released, taking his security under the deed, instead of under the mortgage.

Taking the trust deed was but a change of security. The consideration of the mortgage was purchase-money, and it so continued under the deed of trust: *Curtis v. Root*, 20 Ill. 53.

Although other indebtedness, of which there is no proof, may have been secured by the trust deed over and above the purchase-money for the Dibbs farm of fifty-nine acres, or the money secured thereby partially paid, still appellee should have tendered the amount due on the purchase-money advanced for the fifty-nine acres; not having done so, the title passed to appellant by the sale under the trust deed to this fifty-nine acres, and the appellant was entitled to recover them in his action of ejectment.

The judgment of the court below is reversed, and the cause remanded for other proceedings not inconsistent with this opinion.

Judgment reversed.

MORTGAGE BY HUSBAND ALONE, TO SECURE PURCHASE-MONEY OF HOMESTEAD, IS BINDING: *Christy v. Dyer*, 81 Am. Dec. 493, and note; although executed to a third person who advances the purchase-money: *Lassen v. Vance*, 68 Id. 322; *Carr v. Caldwell*, 70 Id. 740; *Nichols v. Overacker*, 16 Kan. 52; *Magee v. Magee*, 51 Ill. 502; and see *Tomlin v. Hilyard*, 43 Id. 303, all citing the principal case; and see also *Curey v. Boyle*, 53 Wis. 581; *Beal v. Harrington*, 116 Ill. 123, in which the rule of the principal case was applied so that one who advanced the purchase price of land should be substituted to the lien of the grantor.

AMERICAN EXPRESS COMPANY v. HAGGARD.

[87 ILLINOIS, 465.]

QUESTION WHETHER DEFENDANT IS CORPORATION OR NOT SHOULD BE PRESENTED BY PLEA IN ABATEMENT, and not by motion to quash the return of summons, it being raised upon matter *dehors* the record.

PLEA IN ABATEMENT IS BAD, BECAUSE IT DOES NOT GIVE PLAINTIFF BETTER WRIT, where the "American Express Company" is sued as a corporation, and a plea in abatement is filed in the names of several persons "and others," admitting that they "together with others" were doing business under the name of the "American Express Company," but denying that the company was a corporation. The plea should have set forth who were the "others," so that the plaintiff might know against whom to bring his suit, if the plea should prove to be true.

CLERK IS COMPETENT WITNESS TO PROVE NON-DELIVERY OF PACKAGE, as having no interest in the event of the suit, where the suit is brought by his employer against an express company for the loss of a package of money, the clerk having receipted for the package without receiving it, supposing that he was receipting for other articles, and the clerk's father afterwards voluntarily paid to the employer the amount of the loss.

ACTION MAY BE MAINTAINED AGAINST EXPRESS COMPANY FOR LOSS OF PACKAGE OF MONEY, although the amount of the loss has already been paid by a third person. The action may still be maintained for the use of such third person.

EVIDENCE ON CROSS-EXAMINATION IS ADMISSIBLE, where, in an action against an express company for the loss of a package of money, the company proves by its agent the custom of its drivers in regard to the delivery of parcels and taking of receipts, and the cross-examination shows that the driver who had the package had stolen packages of money, and that some time after the loss of the package the company arrested the driver, and made him surrender some money and jewelry, and that he escaped from the officer and ran away.

DELIVERY OF PACKAGE BY EXPRESS COMPANY MUST BE ACTUAL AND BONA FIDE, and not merely formal; and if an agent of the company abstract the package while in the act of delivering it, the company will be liable, even though a receipt be signed, and the form of delivery gone through, by the agent's laying the package for a moment out of his hands.

CASE. The facts are sufficiently stated in the opinion.

R. E. Williams, for the appellants.

W. H. Hanna, for the appellee.

By Court, LAWRENCE, J. This was an action on the case brought by the appellee, David D. Haggard, against the American Express Company, for not delivering a package of money containing \$170.30, sent to the appellee at Bloomington, Illinois. The company was sued as a corporation, the legislature of this state having incorporated the persons who defended this suit by a public act to be found on page 379 of the laws of 1859. There was service on the agent at Bloomington in the manner prescribed by the statute for service on corporations. The agent came in, and, without denying that he was the agent of the company, denied that he was the agent of such a corporation, and said he knew of no such corporation, and on this affidavit moved to quash the return, which motion the court overruled. The object of the affidavit was to raise the question as to whether the defendants were a corporation, and as this was matter *dehors* the record the question was one to be presented by plea in abatement, and not by motion: *Holloway v. Freeman*, 22 Ill. 201.

The counsel for the appellant then filed a plea in abatement in the name of "Johnston Livingston, William G. Fargo, Henry Wells, and others," admitting that they, "together with others," are doing business under the name of the American Express Company, but denying that said company is now, or ever has been, a corporation. A demurrer was sustained to this plea, and properly. It is defective in not giving the plaintiff a better writ: 1 Chit. 446. It should have set forth who were the "others," with whom Livingston, Fargo, and Wells say they are doing business, under the name of the American Express Company, in order that the plaintiff might know against whom to bring his suit, if the plea should prove to be true.

The admission of the testimony of W. Haggard is also assigned for error. It appears that the witness was a clerk in the hardware store of the plaintiff, who was his uncle; that he was in the habit of often receipting to the company for goods, sometimes two or three times a day, and that he receipted for the package in question, supposing, as he swears, that he was receipting for castings that had been left on the sidewalk. He swears he never received the money in question. After its loss was discovered, with the fact that the witness had given the company a receipt for it, he wrote to his father in Chicago, stating the circumstances, and thereupon his father paid to the plaintiff the amount of his loss. The witness was a minor,

and the money was not paid at his request. He clearly had no legal interest in the event of this suit, and was a competent witness. His liability to the plaintiff is discharged, and he has assumed none to his father, who voluntarily came forward and paid the money.

It is further urged that this payment of money has satisfied the plaintiff's claim, and that his right of action is thereby gone. But the payment was not made for the benefit of the express company, and discharged no right of action which existed against them. This suit may be still prosecuted for the use of the father of the clerk, and such use need not be expressed upon the record. Where A is primarily liable, and B only secondarily, A may still be sued for the benefit of B, though B has paid the debt. Thus, if insured property is destroyed by the act of a wrong-doer, though the insurance company may have paid the loss, the owner of the property may still sue the wrong-doer, and the recovery of the property will be for the use of the insurance company: *Mason v. Sainsbury*, 3 Doug. 61; *Hart v. Western Railroad*, 13 Met. 99 [46 Am. Dec. 719].

It is also urged that the evidence of Fuller called out on the cross-examination was improperly received. Fuller was the agent of the company, and was put upon the stand by them to prove the custom of the drivers of the express wagons, in regard to the delivery of parcels and taking of receipts. The plaintiff, on the cross-examination, proved that it was the custom of the particular driver who had this package to steal money parcels, and that some time after this occurrence the company arrested him, made him surrender \$850 in money and some valuable jewelry, and that the driver escaped from the officer and ran away. We think, after the examination in chief, this evidence was admissible.

The counsel for the appellants further urges, that even if the driver, having laid the package on the counter, stole it while the clerk was signing the receipt, the delivery was complete and the company discharged. But a delivery, to discharge the company, must be actual and *bona fide*, and not merely formal. Here the clerk swears there was no delivery, that he neither saw nor heard of a package of money, and thought he was receipting for a package of castings on the sidewalk. The company is a common carrier and must be held to the strictest responsibility for the honesty of its agents, and if one of them abstract a parcel while in the act of delivering it, the

company will be liable even though a receipt be signed and the form of delivery gone through, by the driver's laying the property, for a moment, out of his hands. We find no error in the record.

Judgment affirmed.

EXPRESS COMPANIES ARE COMMON CARRIERS: *Baldwin v. American Express Co.*, 74 Am. Dec. 190, and note; *American Express Co. v. Baldwin*, 79 Id. 389; *Hayes v. Wells*, 83 Id. 89.

DELIVERY REQUIRED OF EXPRESS COMPANIES: See *Baldwin v. American Express Co.*, 74 Am. Dec. 190, and note; *American Express Co. v. Baldwin*, 79 Id. 389; *Hayes v. Wells*, 83 Id. 89.

ILLINOIS CENTRAL RAILROAD COMPANY v. READ.

[87 ILLINOIS, 484.]

CORPORATION IS RESPONSIBLE FOR NEGLIGENCE OF ITS EMPLOYEES or agents. AGREEMENT EXEMPTING RAILROAD COMPANY FROM LIABILITY FOR ANY INJURY TO PERSON OR PROPERTY OF FREE PASSENGER IS VALID, so far as the consequences of its ordinary negligence are concerned, but not as regards its gross negligence, recklessness, or willful misfeasance.

ACCEPTANCE AND USE OF FREE TICKET ESTABLISHES AS AGREEMENT INDORSEMENT THEREON to the effect that the railroad company will not be liable for any injury to the person or property of the passenger, so far as it is consistent with the rules of public policy.

RELEASE NEED NOT BE AVERRED TO BE UNDER SEAL. A release imports a seal, and it is a matter of evidence whether it have a seal or not, if a seal be necessary.

DAMAGES AGAINST RAILROAD COMPANY FOR INJURY TO PASSENGER MAY COVER the loss, expense, and injury arising at the time of the accident, the bodily pain and mental suffering, and the prospective loss and damage arising from bodily disability, impairment of intellectual faculties or general health, which lessen the passenger's ability of attending to his business, as he could have done had not the injuries been received.

CASE by George D. Read against the Illinois Central Railroad Company. The action was brought to recover for an injury received by Read while riding as a passenger on the defendant's cars. The defendant pleaded, besides the general issue, several special pleas, the substance of which is set forth in the opinion. A demurrer to these pleas was sustained, but the defendant stood by them, going to trial on the general issue only, but offering evidence to sustain the pleas, which evidence was excluded. The evidence showed that the plaintiff was injured by the running of the engine of a freight train into the cars in which he was riding. The jury were instructed,

substantially, on behalf of the plaintiff, that in assessing damages they might take into consideration, not only the loss, expense, and injury arising at the time of the accident, as well as the bodily pain and mental suffering of the plaintiff, but also the prospective loss or damage, if any, arising from any bodily disability, impairment of his intellectual faculties or general health, which lessen the plaintiff's ability of attending to his business as he could have done had not the injury been received. The jury found a verdict for the plaintiff, and the defendant appealed.

McAllister, Jewett, and Jackson, and George C. Campbell, for the appellant.

Thomas Hoynes, for the appellee.

By Court, BREESE, J. This was an action on the case brought by the appellee against the appellant in the Cook County circuit court for an injury received by appellee while riding on appellant's cars.

The general issue was pleaded, and also three special pleas, setting up as a defense the fact that without any consideration appellant had given to appellee a free ticket or pass to ride on the railroad for a certain time, on which ticket was indorsed this agreement: "The person accepting this free ticket assumes all risks of accidents, and expressly agrees that this company shall not be liable under any circumstances for any injury to the person or for any loss or injury to the property of the passenger using this ticket."

A demurrer to those pleas was sustained, and the only question arising upon them is as to the effect of this agreement.

There was also a plea of release by appellee to appellant, as follows: "That after the committing of the several grievances in, etc., and before the commencement of this suit, to wit, on, etc., at, etc., the plaintiff, for a valuable consideration to him in hand paid by the said defendant, did release and forever discharge the said defendant of and from any and all liability to the said plaintiff for or by reason of the said several supposed grievances, and each and every of them, in the said declaration set forth," concluding with a verification. To this plea a general demurrer was sustained.

The questions presented by the record for our deliberation are, the validity of these pleas, and another question as to the propriety of certain instructions given for appellee, and the

incidental question of damages, which we will not consider at this time.

It is insisted by appellant that the indorsement on the free ticket was in all respects a valid agreement, and was a perfect immunity to the company for any accident or injury that might happen to the person holding it while upon the cars, no matter how the injury might be occasioned; that the holder assumes all the risks of injury from the negligence of the servants and agents of the company; and that it was competent for the parties to make the agreement, and when made is valid and binding.

The first case cited by appellant in support of this proposition is the case of *Welles v. New York Cent. R. R. Co.*, 28 Barb. 641, a case quite similar to the one before us.

In that case it was held such agreements are valid, and exempt the company from all injuries, except such as are the result of fraudulent, willful, or reckless misconduct on the part of the defendant's officers or agents. It is there held, also, that it is now an admitted principle that a common carrier, like other bailees for hire, may limit his risk by express contract, although a carrier cannot contract for an exemption from losses arising from his own personal fraud or gross negligence. Such a contract would be *contra bonos mores*, and void.

This case was taken to the court of appeals, where it was held there was nothing illegal in such contracts, and that by a fair construction their stipulations cover every degree of negligence, save gross negligence, which is evidence of fraud or of willful injury. The court also held that though this rule applied to individual carriers of persons, it could not apply to corporations engaged in that business. The court say, fraud and willful misfeasance include a will, a motive, and a corporation, as such, can have no motive, no will, though its agents may have both; and it would hardly do to hold the property of corporations liable for the willful or criminal act of a person employed by the corporation, as such acts cannot be said to be done in the course of his employment.

And the court further say that the term "gross negligence," as used by the law, has a technical meaning, which is not properly applicable to those acts of servants of a corporation for which the corporation is responsible; though as between their acts which are slightly negligent and those which are very negligent there is no different rule of responsibility, — it is the fact of negligence, mere negligence, and not its degree, which incurs the liability; that the contract in question is

simply a contract not to be liable for the mere negligence of the agents of the company, and that the judge who tried the cause was not authorized, by the agreed state of facts on which the case was tried, to find that the injury was the result of "gross negligence," and that the case must be considered as if the word "gross" were omitted in the finding. Justice Southerland, who dissented, held the contract for exemption was illegal and void as against public policy, as tending to lessen the care such companies are required to bestow, and which is imposed on them as a public duty as common carriers of persons and property. This case also holds the company would be liable for gross negligence.

The next case cited by appellant is the case of *Smith v. New York Central R. R. Co.*, 29 Barb. 132. That case also held that while a carrier of passengers may by positive stipulation release himself to a limited extent from the consequences of his own negligence or that of his servants, the contract, to enable him to do so, must be clear and explicit in its terms, and plainly covering such a case. The immunity of the carrier must be shown on the face of the contract. The company was held liable for the gross negligence and want of ordinary care of their servants and agents. The holder of the free ticket in this case had taken the risk of personal injury "from whatever cause."

The case of *Bissell v. New York Central R. R. Co.*, 29 Barb. 630, shows the same contract, and the determination of the court was the same, that the company was liable for gross negligence, and Justice Smith, who delivered the opinion of the court in the case of *Welles v. New York Central R. R. Co.*, 26 Id. 641, and who concurred in the ruling of this case of *Bissell*, thought the verdict in it could be sustained without involving any inconsistency between the two cases, for the reason that *Bissell's* case was put on the ground of gross negligence, and that there was no evidence in *Welles's* case showing how the collision happened.

The next case is that of *Perkins v. New York Central R. R. Co.*, 24 N. Y. 196 [82 Am. Dec. 282], in which it was held that a railroad corporation could not by contract exempt itself from liability to a gratuitous passenger for damage resulting from its own willful misconduct or recklessness which is equivalent thereto. But it may contract for exemption from liability from any degree of negligence in its servants other than the board of directors or managers who represent the corporation itself for all general purposes.

In Welles's case, as in this, the New York courts attempt a distinction between the negligence of the corporation acting through its president and board of directors and the negligence of their employees or servants and agents, a distinction which, we confess, we are unable to perceive. All corporations act by and through their agents, for whose acts, in the line of their business, the corporation appointing them is held liable.

This court has held that a railroad corporation is liable in an action of trespass for an assault and battery committed by an employee of the corporation on a passenger on the train: *St. Louis, Alton, and Chicago R. R. Co. v. Dalby*, 19 Ill. 353.

In that case we said, in answer to the argument, that as the corporation has no lawful authority to order an unlawful act to be done, or to order a lawful act be done in an improper way, or so that it shall violate the rights of others, the act, whenever such is the case, becomes the act of the agent, and not of the corporation; that if this position was adopted a corporation could never be held for any affirmative act, for whenever such affirmative act is a violation of the rights of another, the ready and invariable answer would be, that because such act was wrongful, it was therefore unlawful and not authorized by its charter, but the individual act of those who represent it and exercise its functions. The result then would be this: if the act was right and lawful, then it is the company's; but if it was wrong and not legally justifiable, then it was not the act of the company, which, it would be said, was a stranger to it. The result of the position is, that the company cannot be liable for any trespass, for a trespass is an unlawful act, and no company or corporation can be legitimately empowered to do an unlawful act. Now, there are cases to be found, mostly in the Year-books, where courts have been misled by this sort of reasoning, and held that no corporation can be liable for any trespass. But such never was the rule either of the civil or the common law, as applied to private remedies for such wrongs.

It is admitted that a corporation may commit a trespass on property; then how absurd it is to say that if the servant of the company throws the passenger's baggage from the cars, it is the act of the company, but if he throws off the passenger himself, it is not.

This case goes the whole length of holding a corporation responsible for the unlawful acts of its employees or agents, which includes willful injuries or injuries resulting from gross negligence.

All the cases cited by appellant admit the validity of the agreement set forth, but confine its operation to cases of ordinary but not gross negligence. The same ruling has obtained in the courts of Great Britain: *York, Newcastle, and Berwick R'y Co. v. Crisp*, 14 Com. B., 78 Eng. Com. L. 527; *Shaw v. York and North Midland R'y Co.*, 13 Q. B., 66 Eng. Com. L. 345; *Austin v. Manchester, Sheffield, and Lincoln R'y Co.*, 10 Com. B., 70 Eng. Com. L. 453. And by this court, in the case of *Illinois Central R. R. Co. v. Morrison*, 19 Ill. 136. It was there said the rule established in England and in this country, that railroads have a right to restrict their liability as common carriers by such contracts as may be agreed upon specially, was a good rule, the railroad companies still remaining liable for gross negligence or willful misfeasance, against which good morals and public policy forbid they should be permitted to stipulate. A reference was made, as authority for this doctrine, to 1 American Railway Cases, in note 181; Redfield on Railways, 264; *Davidson v. Graham*, 2 Ohio St. 131.

And we believe the rule is now universal in the courts of this country.

All the cases cited by appellant admit that acts of gross negligence are not exempted by the agreement pleaded. The declaration was in case, in three counts, for gross negligence, to which the agreement did not apply, consequently the court decided correctly in sustaining the demurrer to the pleas, gross negligence not being within the spirit of the contract.

The fourth plea was demurrable for the reason that it attempts to confine the negligence complained of to the negligence of the agents and employees of the company, for which the company was responsible, as we have said above.

While we hold this agreement did not exempt the railroad company from the gross negligence of its employees, we are free to say that it does exempt it from all other species or degrees of negligence not denominated gross, or which might have the character of recklessness. For such unavoidable accidents as will happen to the best managed railroad trains, this agreement would be a perfect immunity to the company. It is not, as appellee's counsel seems to suppose, a mere notice, like the one in the case of *Western Transportation Co. v. Newhall*, 24 Ill. 466 [76 Am. Dec. 760]. In that case a condition was printed on the back of the bill of lading or receipt for the powder. We held this was but a notice by which the carrier's

liability could not be restricted, even if brought home to the shipper, but that it could be limited by a special contract with the owner of the goods.

The free ticket was a gratuity, and the acceptance and use of it establishes the indorsement thereon as an agreement between the party giving and the party receiving. By using the ticket he assents to the terms on which it was given, and it becomes to all intents and purposes an agreement. In Newhall's case there was no agreement, but a mere notice, and Newhall paid for the carriage of his goods.

We look upon this free ticket as a special contract in every sense of those words, and as covering all negligence save those we have specified.

The negligence in this case was found by the jury to have been gross, amounting, as we are inclined to think, to recklessness on the part of the conductor having charge of the train in which appellee was a passenger, consequently the company is not protected by this special contract.

But there is one error of the court below which must reverse this judgment. The defendant's fifth plea sets up a release of all damages occasioned by the grievances complained of for a valuable consideration paid by the defendant to the plaintiff.

This plea is a good plea of a release, both in form and substance.

We have looked into the books, and can find no case wherein it has been held in pleading a release that it should be averred it was under seal. A release *ex vi termini* imports a seal, and it is matter of evidence whether it have a seal or not if a seal be necessary. The plea should have been traversed. The demurrer admits the release for a valuable consideration. But this court said, in *Benjamin v. McConnell*, 4 Gilm. 536 [46 Am. Dec. 474], and we repeat here, when a valuable consideration is expressed in a release, or otherwise proved to have passed between the parties, it is totally immaterial whether the instrument is sealed or otherwise. In *Ryan v. Dunlap*, 17 Ill. 40 [63 Am. Dec. 334], this court held that a release of a debt secured by mortgage need not be under seal, *a fortiori* it need not be where prospective damages are released.

The declaration in the first, second, and fourth counts avers gross negligence on the part of appellants, whilst the third avers negligence only. Four of the special pleas are to the whole declaration, but they do not answer the charge of gross negligence, consequently the demurrer to them was properly

sustained. The appellant will have leave to amend, so as to apply the pleas to the third count, which alleges negligence only, should he desire so to do.

For this error in sustaining the demurrer to the fifth plea, the judgment must be reversed and the cause remanded.

As to the instructions for appellee, we perceive no inconsistency or error in them.

Judgment reversed.

PRIVATE CORPORATION IS LIABLE FOR TORTS OF ITS AGENTS when committed within the scope of their authority: *Main v. North Eastern R. R.*, 75 Am. Dec. 725; *Sanford v. Eighth Avenue R. R.*, 80 Id. 236; *Pennsylvania R. R. v. Vandiver*, 82 Id. 520, and the cases in the notes thereto; *Toledo etc. R'y v. Harmon*, 47 Ill. 307, citing the principal case.

COMMON CARRIER OF PASSENGERS, HOW FAR MAY EXEMPT HIMSELF FROM LIABILITY BY CONTRACT: See *Perkins v. New York Central R. R.*, 82 Am. Dec. 232, and note discussing the subject; *Bisell v. New York Central R. R.*, 82 Id. 369, and note; *Indiana Central R'y v. Mundy*, 83 Id. 339. Railroad companies may, by contract, exempt themselves from liability for the negligence of their servants, other than that which is gross or willful: *Arnold v. Illinois Central R. R.*, 83 Ill. 280; *Toledo etc. R'y v. Beggs*, 85 Id. 84, citing the principal case.

RELEASE NEED NOT BE AVERRED TO BE UNDER SEAL: *Bailey v. Cowles*, 86 Ill. 335, citing the principal case.

BLUE v. BLUE.

[88 ILLINOIS, 9.]

SUBSEQUENT PURCHASER OF LANDS IS CHARGEABLE WITH NOTICE OF DECREE IN CHANCERY by which the rights of a party to the lands are declared, and will hold them subject to such rights. Where, therefore, a tract of land held by a husband under a contract of purchase is set apart as alimony to his wife by a decree of divorce, a subsequent assignment of the contract by the husband and a conveyance from the original vendor to the assignee will not impair the rights of the wife; the grantee will hold nothing but the mere legal title, which he will in equity be bound to convey to her.

PERSON DOES NOT BY ATTEMPTING TO DEFRAUD ANOTHER FORFEIT HIS PROPERTY to the latter.

WHERE DECREE FOR ALIMONY ALLOTS PART OF TRACT OF LAND TO WIFE and the other part to the husband, and provides that, as between them, certain encumbrances upon the whole tract shall rest exclusively upon the husband's portion, if the wife, to protect her interests, discharges a portion of the encumbrance, she will have a lien upon the husband's portion to have the money paid by her refunded. But the payment by her of a small portion of the purchase-money of the land will not entitle her in equity to a conveyance to her of the whole tract.

DECREE CANNOT AFFECT RIGHTS OF PERSONS NOT PARTIES to the suit in which it is rendered.

PERSON RIGHTFULLY IN POSSESSION UNDER CONTRACT OF PURCHASE IS OWNER of the premises, within the meaning of the homestead law, and where he is the head of a family, residing with them upon the land and using and occupying it as a homestead, he has such a title as is protected from levy and sale.

UNLESS REQUIREMENTS OF STATUTE ARE OBSERVED IN MAKING LEVY AND SALE UNDER EXECUTION OF HOMESTEAD exceeding the amount allowed by law, the sale will be unauthorized; but a purchaser at such sale will acquire an equitable lien upon the surplus, which he may enforce as soon as the premises cease to be a homestead, and a purchaser from him will acquire this lien and may enforce it against the surplus.

HUSBAND DOES NOT BY COMMITTING ADULTERY FORFEIT HIS RIGHT to claim the benefit of the homestead law.

AWARD OF COSTS IS IN DISCRETION OF COURT IN ALL SUITS IN CHANCERY which are determined by the court on a final hearing.

SUIT in chancery by Liney Blue against Cyrus H. Blue, Washington Wakefield, and William R. Phelps. In January, 1854, Phelps entered into a contract with defendant Blue to sell to him the south half of the northwest quarter of section 35, township 11 north, range 8 east, situated in Peoria County, to be paid in installments, upon the payment of which Phelps was to convey. Blue entered into possession under this contract and paid several of the installments. In July, 1857, James L. Riggs and Amos L. Merriman recovered a judgment against Blue, and on the 23d of December, 1857, an execution was levied upon the land already mentioned, together with the northeast quarter of the northwest quarter of section 34, in the same township, and on the 30th of January, 1858, the lands levied on were sold, and Merriman, one of the plaintiffs in the execution, became the purchaser, and obtained a sheriff's deed therefor on the 28th of November, 1859. In July, 1859, Liney Blue obtained a decree of divorce from Cyrus H. Blue on the ground of adultery. The decree also enjoined Blue from encumbering or disposing of the eighty acres of land he had purchased of Phelps, and another tract, which he seems to have owned, the southeast quarter of the northwest quarter of section 34, in the same township, reserving the question of alimony for further direction. On the 15th of December, 1860, it was decreed, by consent and agreement of the parties, that Mrs. Blue should have and hold for her natural life twenty-five acres, part of the south half of the northwest quarter of section 35, and ten acres in a square form out of the southwest corner of the southeast quarter of the northwest quarter of section 34, with full right and power to lease, mortgage, and convey the same for and during the

term of her natural life, and upon her death the same should vest in her children in fee; and it was further decreed that Blue should hold the remainder of said tracts for life, with remainder over to their children in fee, with full power in him to sell, mortgage, and convey his estate in the same, and that as between themselves the encumbrances on said real estate should be thrown on that part assigned and set off to said Blue, so that Mrs. Blue should hold her thirty-five acres free from encumbrances. Mrs. Blue entered into the possession of the land set off to her. On the seventeenth day of December, 1860, Mrs. Blue, to protect her interests, took a conveyance from Merriman of the land purchased by Blue from Phelps, together with the northeast quarter of the northwest quarter of section 34. Mrs. Blue also paid thirty-seven dollars to Phelps, in order to prevent a forfeiture of the contract. Afterwards Blue assigned the Phelps contract to Wakefield, so far as appeared, without consideration, and for the purpose of defrauding Mrs. Blue out of her rights under the decree for alimony. At the same time Blue paid the amount due to Phelps, and induced him to convey the land to Wakefield. The complainant prayed for an injunction against Blue and Wakefield, restraining them from in any way interfering with her possession, and that the deed from Phelps to Wakefield be set aside, and that Phelps be decreed to convey the whole of the land in fee-simple to her. At the August term, 1864, a decree was rendered finding that as to the twenty-five acres set off to the complainant as alimony the equities were with her, and directing that Wakefield should, within thirty days, make her a deed therefor, to have and to hold during her natural life, with the remainder to the children in fee, and in default of his making such deed, that the master should make the same; and enjoining Blue and Wakefield perpetually from interfering in any way with the possession of the complainant, and from setting up the deed from Phelps to Wakefield in any court or place to her prejudice. It was further decreed that, as to the other relief prayed for, the complainant take nothing, and that she pay one third of the costs of the suit. The complainant appealed.

McCulloch and Taggart, for the appellant.

Johnson and Hopkins, for the appellees.

By Court, WALKER, C. J. The question of alimony had been settled, and each party had assigned to them portions

of the property to hold in severalty. Neither had any claim to that held by the other. It is true that the portion held by Blue was charged with all of the encumbrances upon the whole of that tract. This imposed the obligation upon him to remove the encumbrance upon the portion assigned to appellant. Nor could he escape that liability by having it conveyed to any other person. Nor did Wakefield acquire any lien upon the property by simply having the conveyance made to him, as there does not appear to be any evidence that he paid a consideration for the property; and it has every appearance of a fraud upon the rights of appellant.

But even conceding that he paid a consideration for the conveyance from Phelps, he took it subject to the rights of appellant under the decree, as he is chargeable with notice of the decree and its provisions. Being chargeable with notice of the decree, he could by an assignment of the contract by Blue and a conveyance from Phelps acquire no better title to appellant's portion of the premises than was held by Blue. He acquired nothing but the mere legal title to appellant's portion of the land, and is in equity bound to convey it to her. In so decreeing the court below committed no error.

We are unable, however, to understand upon what principle Wakefield was bound to convey the remainder of the tract to her, or that she should have the estate in that portion in fee or for life. If she contributed to remove the encumbrance from the land to protect her own interests, she has no doubt a lien upon the portion set apart to Blue to have it refunded, but the payment of thirty-seven dollars for that purpose could not entitle her in equity to property costing near a thousand. It cannot be said, and we presume it will not be contended, that if one person attempts to defraud another, however immoral and reprehensible the act, such person forfeits his property to the other.

Had appellant been compelled to pay all of the purchase-money on the contract to protect her rights, it would be otherwise, not because the fraud was attempted, but because she had paid the purchase-money for the land. But to say that because she had paid thirty-seven dollars of the purchase-money on a purchase of land for so large a sum gives her the right to have the title to the whole property, would be as inequitable as to permit Blue to defeat her title by assigning the contract. If the sum she claims to have paid was applied to the purchase, she has a right to have it refunded, and the court

below should have ascertained that fact and decreed accordingly.

If the right to have it conveyed to her is based upon the ground that the children are entitled to the remainder, it is equally untenable. Blue was entitled to hold his portion for life, and he did not forfeit that right to her by attempting to cut off their estate in remainder. If the children were to file a bill they no doubt could, on a proper showing, have their rights established and protected, but they are not parties to this bill, and the court for that reason was not authorized to render a decree in their favor. Nor does this decree, or any other which the court might have rendered, so long as they are not parties, affect their rights. As to this tract, we see no reason for reversing the decree of dismissal.

If this transcript is correctly copied, one forty-acre tract of land was levied upon and sold, whilst a different tract was conveyed by the sheriff to Merriman. The levy and certificate of purchase describe the land as the northeast quarter of the northwest quarter of section 34, and the sheriff's deed to Merriman and his deed to appellant convey the southeast quarter of the northwest quarter of the same section, and the decree setting apart appellant's alimony follows the latter description, so that, be the true description as it may, no title to this tract was vested in Merriman by the sale under execution, nor did his conveyance to appellant pass any title.

The eighty-acre tract seems to have been truly described, and passed the title, unless it was exempt from such a sale under the homestead law. At the time the levy and sale were made, Blue held the bond for a title, had paid a portion of the purchase-money, was the head of a family, residing with them upon the land, using and occupying it as a homestead. On the one side it is claimed that this was such a title and homestead as exempted it from levy and sale, whilst the other insists that he was not the owner within the meaning of the statute. He had such an interest in the land as the statute has rendered liable to levy and sale on execution, unless protected by the homestead law: *Scates's Comp.* 602.

When the reason for the adoption of the homestead law is considered, no reason presents itself to our minds why it should not be exempt. The object in adopting the act was to secure to the debtor and his family a home, not worth more than one thousand dollars. Such a case as this falls fully within the mischief of the old, and is clearly within the rea-

son of the new law. And whether the debtor held in fee-simple absolute, for life or for a term of years, the reason for affording the exemption applies with equal force. Here Blue was rightfully in possession under a contract of purchase, and we think was the owner within the meaning of the statute.

It is, however, objected that there is no evidence to show that this tract was worth only one thousand dollars or less. This cannot vary the result, as if it was not worth more than that sum the sale was prohibited by the statute, and if worth more, then none of the requirements of the statute were observed in making the levy and sale. So that in either view the sale was unauthorized.

It is again contended that the husband, by committing adultery, forfeited his right to claim the benefit of the homestead law. We are referred to no law or adjudged case announcing such a rule, nor is it believed that any such exists. Nor can we see how a stranger to the estate could be benefited by his infidelity to the marriage contract, even if he had suffered a forfeiture. If such a forfeiture was created in this case, it operated to defeat the wife's right to claim the homestead as well as his. And the law has clearly placed it beyond the power of the husband to deprive the wife of that right so long as it remains their residence, and it was such when the levy and sale were made.

If this piece of land was worth over one thousand dollars, Merriman by his levy and sale acquired an equitable lien upon the surplus, which he had the right to enforce as soon as it ceased to be a homestead. And when appellant purchased of Merriman she acquired the lien, and may enforce it against such surplus. The court below should have ascertained the value of this property, and if it exceeded one thousand dollars, he should have declared the amount paid by appellant to be a lien on the surplus, and decreed its payment out of the portion assigned to Blue, as it had been previously, by the agreement of the parties and the decree of the court, charged with all encumbrances, and in default of payment the property should be sold, subject to the rights of the children.

The last error assigned questions the correctness of the decree requiring appellant to pay one third of the costs. In such a case, that is purely a question of discretion in the court. By the fifteenth section of the cost act (R. S. 128), it is declared that upon the dismissal of the bill by complainant, or by defendant's dismissing it for want of prosecution, the defendant

shall recover of the complainant his full costs; but in all other cases in chancery, not otherwise directed by law, it shall be in the discretion of the court to award costs or not, as shall be just. This was on a final hearing, and we have been referred to no law, nor are we aware of any, that has provided how the costs on such a hearing shall be awarded; hence by this section it is a matter of discretion.

Inasmuch as appellant paid thirty-seven dollars to Phelps, to prevent a forfeiture of the contract for the eighty-acre tract, the court below should have rendered a decree for that amount at least, and failing in this, there was error in the decree, which must be reversed and the cause remanded.

SALE OF HOMESTEAD UNDER EXECUTION.—The homestead statutes imperatively prohibit the sale under execution of the homestead as defined. The great majority of the cases hold that this prohibition is absolute, and that a sale under execution of property exempt under the homestead laws, made against the objections and in defiance of the rights of the claimant, is absolutely void, and conveys no title to the purchaser: *Thompson on Homesteads and Exemptions*, sec. 625; *Freeman on Executions*, sec. 215; *Hughes v. Watt*, 26 Ark. 228; *Kendall v. Clark*, 10 Cal. 17; S. C., 70 Am. Dec. 691; *Ackley v. Chamberlain*, 16 Cal. 181; S. C., 76 Am. Dec. 516; *Williams v. Young*, 17 Cal. 403; *McDonald v. Badger*, 23 Id. 393; S. C., 83 Am. Dec. 123; *Spencer v. Geiseman*, 37 Cal. 96; *Defelin v. Pico*, 46 Id. 289; *Wilson v. Madison*, 58 Id. 1; *Barrett v. Sims*, 59 Id. 615; *Pinkerton v. Tumlin*, 22 Ga. 165; *Wiggins v. Chance*, 54 Ill. 175; *Conklin v. Foster*, 57 Id. 104; *Asher v. Mitchell*, 92 Id. 480; *Barrett v. Wilson*, 102 Id. 302; *Morris v. Ward*, 5 Kan. 239; *Wing v. Hayden*, 10 Bush. 276; *Beecher v. Baldy*, 7 Mich. 488; *Vogler v. Montgomery*, 54 Mo. 577; *Fogg v. Fogg*, 40 N. H. 282; S. C., 77 Am. Dec. 715; *Tucker v. Kenniston*, 47 N. H. 267; *Laconia Savings Bank v. Rollins*, 63 Id. 66; *Lute v. Reilly*, 65 N. C. 21; *Taylor v. Rhyme*, 65 Id. 531; *Abbott v. Cromartie*, 72 Id. 292; *Lambert v. Kinnery*, 74 Id. 350; *Gray v. Baird*, 4 Lea, 212; *Sampson v. Williamson*, 6 Tex. 102; S. C., 55 Am. Dec. 762; *Hamblin v. Warnecke*, 31 Tex. 91; *Beard v. Blum*, 64 Id. 59; *Myers v. Ford*, 22 Wis. 139. And the homestead is as much exempt from attachment as from execution: *Grubbe v. Ellyson*, 23 Ark. 287. The homestead right of exemption from sale under execution does not depend upon the character of the title held by the party claiming it. Whatever title he may have is protected from forced sale: *Spencer v. Geiseman*, 37 Cal. 96. While a deed given to a purchaser of a homestead at an execution sale conveys no title, it is such a cloud upon the claimant's title as a court of equity will remove: *Riley v. Pehl*, 23 Id. 70. But a complaint which alleges that the defendant, as sheriff, under an execution against the plaintiff, levied on and sold certain property which was the homestead of the plaintiff, and claims damages in two thousand dollars, does not state facts sufficient to constitute a cause of action. No damage results from the sale of homestead property under execution, because the sheriff's deed in such case conveys no title, and the purchaser acquires no right to the property sold: *Kendall v. Clark*, 10 Id. 17; S. C., 70 Am. Dec. 691. An *ex parte* confirmation of a sale upon execution of a part of the homestead is not such an adjudication as will deprive a party who actually owns and occupies the same of his right of

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homestead: *McHugh v. Smiley*, 17 Neb. 620. In *Linton v. Quimby*, 57 Ill. 271, four lots were sold separately under an execution, and the execution debtor brought an action to set aside the sale, and the court below set it aside as to one of the lots which was worth more than the amount of the homestead exempt by law. The supreme court held that the claimant had obtained all the relief to which he was entitled. In Iowa, where it is properly determined under the code of that state that the whole of an execution debtor's farm of 160 acres was exempt as a homestead, being less in value than five hundred dollars, the fact that it was not platted as such prior to the levy of the execution upon a portion of it will not render it liable to sale under such levy: *Green v. Farrar*, 53 Iowa, 426. But it seems that in that state a sale of lands under execution, upon which the execution defendant resides, without platting it and setting it aside as a homestead, is voidable only, but not void, and cannot be attacked collaterally: *Martin v. Knapp*, 57 Id. 336. In New Hampshire it is held that a levy on premises in possession of the execution debtor claiming a homestead therein, without any application on his part for an assignment of a homestead to him, is valid against a grantee of the debtor whose deed is fraudulent and void as to creditors, although the value of the premises does not exceed the amount exempted by law from attachment or levy: *Currier v. Sutherland*, 54 N. H. 475; S. C., 20 Am. Rep. 143. But while there are a few cases to the contrary, the great weight of authority holds that a conveyance of property set aside for fraud at the suit of the grantor's creditors does not prevent him or his wife from afterwards claiming a right of homestead in the premises so conveyed. The fraudulent conveyance does not place the creditors in any better position than they occupied before it was made. The homestead still remains exempt: *Freeman on Executions*, sec. 138; *Thompson on Homesteads and Exemptions*, sec. 408; *Dearman v. Dearman*, 4 Ala. 521; *Vaughan v. Thompson*, 17 Ill. 78; *Muller v. Inderreiden*, 79 Id. 382; *Lisky v. Perry*, 6 Bush, 515; *Kuevan v. Specker*, 11 Id. 1; *White v. Givens*, 29 La. Ann. 571; *Succession of Cottenham*, 29 Id. 669; *Legro v. Lord*, 10 Me. 161; *Castle v. Palmer*, 6 Allen, 401; *Smith v. Rumsey*, 33 Mich. 183; *Smith v. Allen*, 39 Miss. 469; *Pennington v. Seal*, 49 Id. 518; *Edmonson v. Meacham*, 50 Id. 34; *Vogler v. Montgomery*, 54 Mo. 577; *Rankin v. Shaw*, 94 N. C. 405; *Sears v. Hanks*, 14 Ohio St. 298; *Planters' Bank v. Henderson*, 4 Humph. 75; *Wood v. Chambers*, 20 Tex. 247; S. C., 70 Am. Dec. 382; *Cox v. Shropshire*, 25 Tex. 113; *Foster v. McGregor*, 11 Vt. 595; *Danforth v. Beattie*, 43 Id. 138; *Shipe v. Renass*, 28 Gratt. 716; *Boynton v. McNeal*, 31 Id. 456; *Marshall v. Sears*, 79 Va. 49; *Bond v. Seymour*, 1 Chand. 40; *Dreutzer v. Bell*, 11 Wis. 114; *Pike v. Miles*, 23 Id. 164; *Murphy v. Crouch*, 24 Id. 365; *Bean v. Smith*, 2 Mason, 252; *Cox v. Wilder*, 2 Dill. 45; *Smith v. Kehr*, 2 Id. 50; *McFarland v. Goodman*, 6 Biss. 111; *Smythe on Homesteads and Exemptions*, sec. 555.

In the case of *Cox v. Wilder*, *supra*, Dillon, J., in delivering the opinion, said: "If the law gave to a single man the right to this exemption, it would accord with the natural desire to punish fraud to visit a penalty upon him; but to denounce a forfeiture of the homestead where there is a family subverts the policy on which the exemption is provided and allowed." And Scott, J., in delivering the opinion of the court in *Sears v. Hanks*, 14 Ohio St. 298, said: "The rights of the plaintiffs in this action are only those which belong to creditors seeking to set aside a voluntary conveyance of their debtor, made in fraud of their rights, and to enforce their judgment liens against the property so conveyed. Their claim is not under or through the fraudulent conveyance, but adverse to it; and when at their suit it has been set aside,

and declared wholly void as against them, they cannot be allowed, as creditors, to set up this void conveyance, against which they are claiming, for the purpose of enlarging their rights or remedies against their debtor, or for the purpose of estopping him from the assertion of the rights which he would otherwise have as against them. As between debtor and creditor, the deed is simply void, and cannot, therefore, affect the rights of either. A judgment creditor's lien is only upon the property of his debtor; and the purchaser at sale on execution takes in general only the debtor's title. If the debtor has no title or interest in the property levied on, there is nothing for the creditor to sell; and it is not competent for the creditor, while selling the alleged title of his debtor, to deny his right to a homestead on the ground that he has no interest in the property about to be sold. If he has an interest in the homestead property which the creditor can sell, he has interest enough to secure his homestead from sale. The validity of the fraudulent conveyance, as between the parties to it, is no concern of the creditor when it has been set aside as to him. All he can ask is that, as against him, it shall confer no rights upon any one." But where a partnership, in embarrassed circumstances, converts its means, upon the strength of which it has obtained credit, into real estate, to be claimed as a homestead by one of the firm, and for the purpose of placing their property beyond the reach of their creditors, the land is still liable for the debts of the firm, and is subject to the executions of the creditors, notwithstanding the declaration of homestead: *Bishop v. Hubbard*, 23 Cal. 514; S. C., 83 Am. Dec. 132. In Massachusetts, the premises occupied by the debtor as a residence may be sold under execution, subject to the estate of homestead: *Pittsfield Bank v. Hawk*, 4 Allen, 347; *Castle v. Palmer*, 6 Id. 401; *Swan v. Stephens*, 99 Mass. 7. And in *Gilbert v. Cowan*, 3 Lea, 203, it was held that the legal estate of the head of a family in a homestead set apart to him may be levied upon and sold, subject to the homestead right. In the case of *Swan v. Stephens*, *supra*, a sheriff's sale upon execution of the judgment debtor's right in the equity of redemption in real estate which the debtor claimed to be exempt as a homestead was held not to be invalid because not made expressly subject to the homestead right, since such a sale is necessarily subject to the right, whether declared to be so or not. But in *Jolly v. Lofton*, 61 Ga. 154, it was held that, pending the existence of a homestead, the reversionary interest of the person from whose property it was set apart is not subject to levy and sale. Warner, C. J., in delivering the opinion in that case, said: "The homestead is set apart for the use of the debtor's family as contemplated by the constitution, and so long as that homestead right continues to exist, no court or ministerial officer of this state has any jurisdiction or authority to enforce any judgment, decree, or execution against the homestead property, which necessarily includes every interest therein, reversionary or otherwise; but when all the beneficiaries of the homestead property cease to exist, then, and not until then, can the reversionary interest of the defendant in execution be levied on and sold." And in *Pope v. Hardie*, 65 N. C. 447, it was decided that the North Carolina act of 1869-70, c. 121, exempting from sale upon execution the reversionary interest in the homestead, was constitutional.

WHEN LAND CLAIMED AS HOMESTEAD EXCEEDS VALUE OR QUANTITY ALLOWED BY STATUTE, the officer holding the execution should not sell until it has been determined, in the manner provided by the statute, what the excess is, so that he may be able to sell a definite interest in the premises: *Hardy v. Sussbacher*, 62 Ala. 44; *Gary v. Eastabrook*, 6 Cal. 457; *Blivins v. Johnson*, 40 Ga. 297; *Kilgore v. Beck*, 40 Id. 293; *Hartsell v. McDonald*, 68

Ill. 297; *Stevens v. Hollingsworth*, 74 Id. 202; *Helpenstein v. Cove*, 3 Iowa, 287; *White v. Rowley*, 46 Id. 680; *Beecher v. Baldy*, 7 Mich. 488; *Vogler v. Montgomery*, 54 Mo. 577; *Tucker v. Kenniston*, 47 N. H. 267. Unless the requirements of the statute in this regard are complied with, the sale by the sheriff will be unauthorized and void, and will convey no title: *Eastabrook v. Gary*, 6 Cal. 457; *Barrett v. Sims*, 59 Id. 615; *Hartwell v. McDonald*, 69 Ill. 297; *Stevens v. Hollingsworth*, 74 Id. 202; *Kerr v. South Park Commissioners*, 8 Bism. 276; *Tucker v. Kenniston*, 47 N. H. 267. An order to sell the whole tract, except the homestead of the proper amount, without specifying what lands shall constitute such homestead, is erroneous: *Hardy v. Sulzbacher*, 62 Ala. 44; *Gary v. Eastabrook*, 6 Cal. 457. Under the Missouri act, where a homestead is claimed, the sheriff cannot proceed with the sale until he has ascertained by appraisers, in the mode directed by the statute, the value and extent of the premises, and that they are beyond the limit protected against executions: *Vogler v. Montgomery*, 54 Mo. 577. And in *White v. Rowley*, 46 Iowa, 680, it was held that where a judgment creditor has failed to select and plat his homestead, it is the duty of the officer holding an execution to cause the same to be done before selling any portion of the premises of which the homestead is a part; and that a failure to do this will render the sale invalid, even though the forty-acre government subdivision, upon which the debtor's residence stands, be not sold. But where the debtor's dwelling-house, garden, orchard, and all his homestead improvements stood upon a forty-acre tract of a farm of 640 acres, and such forty-acre tract exceeded in value the homestead exemption allowed by law, it was held that any part of the remaining portion of the farm might be sold free from any claim of homestead: *Raber v. Gund*, 110 Ill. 581.

If a homestead, when reduced to its lowest practicable dimensions, without ceasing to be a homestead, still exceeds in value the constitutional limit, the court has not, in the absence of statutory provisions, power to allot any exemption in the premises, or to allow any equivalent in money for a homestead exemption: *Miller v. Marx*, 55 Ala. 322; *Garner v. Bond*, 61 Id. 84; *Helpenstein v. Cove*, 3 Iowa, 287; *Beecher v. Baldy*, 7 Mich. 488. But most of the statutes now provide that when the homestead cannot be divided without material injury it shall be sold and the amount exempt paid to the claimant and the residue applied to the satisfaction of the judgment: *Thompson on Homesteads and Exemptions*, sec. 636; *Waleh v. Horine*, 36 Ill. 238; *Hume v. Gossett*, 43 Id. 297; *Pittsfield Bank v. Howk*, 4 Allen, 347. And the proceeds of such sale continue to be exempt from execution either for some period named in the statute or for a reasonable time, to enable the claimant to invest them in a new homestead: *Freeman on Executions*, sec. 235; *Dearing v. Thomas*, 25 Ga. 223; *Macey v. Loyal*, 38 Id. 531; *Waleh v. Horine*, 36 Ill. 238; *Mitchell v. Milhoan*, 11 Kan. 617; *Pittsfield Bank v. Howk*, 4 Allen, 347; *Fogg v. Fogg*, 40 N. H. 282; 8 C., 77 Am. Dec. 715; *Keyes v. Rines*, 37 Vt. 260; *Morgan v. Stearns*, 41 Id. 398; *Watkins v. Blatschnick*, 40 Wis. 347. In *Kaiser v. Seaton*, 62 Iowa, 463, it was held that money due from a railroad company as damages assessed by a sheriff's jury for right of way over a homestead is exempt from execution, notwithstanding the character of the homestead, as such, is not destroyed by the easement.

PRACTICE IN PROCEEDINGS TO APPRAISE AND SET OFF HOMESTEAD.—In Alabama, when a defendant in execution interposes a claim of exemption to lands upon which an execution has been levied, and notice of the claim is given to the plaintiff, the levy will be discharged, unless within ten days the plaintiff contests the claim in writing and under oath; and if the claim is con-

tested, the officer making the levy is prohibited from selling until the contest is decided: *Block v. Bragg*, 67 Ala. 291; *Block v. George*, 70 Id. 409. The officer who has levied on lands has no right to pass upon the sufficiency of the claim to exemption interposed by the execution defendant. It is his business to give notice to the plaintiff, and return the papers to the court: *Block v. Bragg*, 67 Id. 291. When the defendant claims a homestead in lands upon which an execution has been levied by the sheriff, who thereupon appoints commissioners to set apart and appraise the homestead, and neither party objects to the allotment made, the defendant's title to the homestead so allotted becomes perfect, and it is not necessary that there should be a reallocation as against *alias* executions: *Jones v. De Graffenreid*, 60 Ala. 145. Where a party has residences on two separate tracts of land, both levied upon, he may, unless he has previously made his election, even on the day of sale, elect which of the places he recognizes as his homestead, and such election will effect a withdrawal of the place designated from sale, to the extent authorized by the Arkansas statute: *Tumlinson v. Swoinney*, 22 Ark. 400; S. C., 76 Am. Dec. 432. Where a judgment debtor is occupying as a homestead premises in which he has an undivided interest only, and a portion of the premises is not exempt from execution sale, it is not the duty of the sheriff to set off the homestead before proceeding to sell upon the execution: *Farr v. Reilly*, 58 Iowa, 399. In the case of *Bemis v. Driscoll*, 101 Mass. 418, the officer and the appraisers charged with the duty of levying an execution upon a small piece of land returned that the judgment debtor claimed an estate of homestead in the land, and that it could not be divided without damage, and that they had set off eight eighteenths to the debtor and five eighteenths in satisfaction of the judgment. It turned out that the debtor had no valid homestead right in the premises, but it was held that the levy on the five eighteenths was valid. Under the Nebraska practice, the owner of property claimed as a homestead may raise the question of exemption upon a motion to set aside the sale by the sheriff, and the court must decide it when so raised, and such decision, which is appealable, if not appealed from, is final and conclusive: *Spitley v. Frost*, 15 Fed. Rep. 299. In North Carolina, if the execution debtor does not petition for a homestead, it is the duty of the sheriff who has an execution against him to have the homestead laid off at the expense of the creditor; and if the latter refuses to pay the fees for doing so, the sheriff may refuse to execute the process. He is not required to sell the excess until the creditor has paid or offered to pay the fees for so doing: *Lute v. Reilly*, 65 N. C. 20; *Taylor v. Rhyme*, 65 Id. 530. An allotment of appraisers made in these words: "We value the place on which he lives at nine hundred dollars, and the remainder of the homestead gives him an interest of one hundred dollars in the mill," was held to be so vague and indefinite that it amounted to nothing: *Coble v. Thom*, 72 Id. 122. Where the form of return prescribed by the statute was required to state that the appraisers had been sworn, a return which failed to state that they had been sworn was held to render the allotment void: *Smith v. Hunt*, 68 Id. 482. Since the repeal of the act providing that the claimant of a homestead might have the allotment made by the appraisers reviewed by the board of township trustees, he may have their action reviewed by a *recordari*, or by a motion in the cause: *Hartman v. Spiers*, 94 Id. 150. When a homestead has been regularly set off under the Ohio statute, no further proceedings under the execution can be had while the premises remain a homestead: *Wets v. Beard*, 12 Ohio St. 431. The revised statutes of South Carolina provide that when the real estate of the head of a family is levied upon, the officer shall cause a homestead of not more than one

thousand dollars to be set off by three appraisers, one to be chosen by the debtor, one by the creditor, and one by the officer, who shall, after taking an oath, proceed to set out the homestead, and the return thereof shall be made by the officer "for record in court." In an action brought by the purchaser at sheriff's sale to recover the land, the debtor cannot avail himself, as a defense, of a return made by the appraisers but not returned "for record in court": *Ryan v. Pettigrew*, 7 S. C. 146; *Choice v. Charles*, 7 Id. 171. In Wisconsin, if the debtor states with reasonable certainty what he claims as a homestead, it is sufficient, and if the creditor is dissatisfied with the selection made, the officer must cause a survey to be made, setting off the exempt portion in a compact form, on the part including the dwelling house and its appurtenances: *Herrick v. Graves*, 16 Wis. 157; *Myers v. Ford*, 22 Id. 139. In *Schaeffer v. Beldemeier*, 9 Mo. App. 438, it was held that, to prevent a sale of the homestead, a severance may be effected by setting out the homestead subject to a perpetual easement of way over it, when this can be done without greatly depreciating the value of the premises or greatly inconveniencing the parties.

WHETHER JUDGMENT IS LIEN UPON HOMESTEAD. — In some of the states, the homestead exemption is regarded as a mere personal right of the claimant, by virtue of which the property is withdrawn from forced sale so long only as it retains the homestead character. Where this view is taken of the nature of the exemption, the lien of a judgment attaches to the property, but to be in abeyance so long as the defendant is able to maintain his homestead right. In *Hoyt v. Howe*, 3 Wis. 752, S. C., 62 Am. Dec. 705, it was decided that the homestead is subject to the lien of a judgment, and may be sold under execution after it has ceased to be such by the voluntary act of the debtor. The same doctrine is laid down in *Tillotson v. Millard*, 7 Minn. 513; S. C., 82 Am. Dec. 112. But the law in both of these states has since been changed by statute, in Wisconsin by the act of May 17, 1858, and in Minnesota by the act of March 10, 1860, by which judgments rendered subsequent to the passage of the acts were deprived of any lien upon the homestead: See *Folsom v. Carl*, 5 Minn. 333; S. C., 80 Am. Dec. 429; *Seamans v. Carter*, 15 Wis. 548; S. C., 82 Am. Dec. 696. In New York it is held that the statute does not exempt the property from becoming bound and charged by a judgment, but from sale on execution only, so long as the exemption continues in force: *Smith v. Brackett*, 36 Barb. 571. And in North Carolina, since the passage of the act of 1885, c. 359, a judgment is a lien on the homestead interest in that state: *Ramkin v. Shaw*, 94 N. C. 405. In Nebraska, also, a judgment rendered in a court of record where the homestead is situated is a lien upon such homestead, which will become operative upon the sale or abandonment thereof by the judgment debtor: *McHugh v. Smiley*, 17 Neb. 620. But in Freeman on Executions, sec. 249, the author says: "The lien of a judgment and of an execution is almost universally regarded as arising from the right to sell property thereunder. And hence, where the right of sale cannot be asserted, the existence of the lien must be denied. It would follow, as a logical result, from the application of this general principle, that a judgment rendered after the creation and before the abandonment of a homestead cannot be a lien thereon, and, as a result of this last proposition, it must follow that a homestead may be sold or mortgaged, and that the title of the vendee or mortgagee will be paramount to the title of a prior judgment creditor." These views are sustained by the following cases: *Ackley v. Chamberlain*, 16 Cal. 181; S. C., 76 Am. Dec. 516; *Bowman v. Norton*, 16 Cal. 213; *McDonald v. Badger*, 23 Id. 393; S. C., 83 Am. Dec. 123; *Marriner v*

Smith, 27 Cal. 649; *Deffels v. Pico*, 46 Id. 289; *Barrett v. Sims*, 59 Id. 615; *Green v. Marks*, 25 Ill. 221; *Fishback v. Lane*, 25 Id. 437; *Bliss v. Clark*, 39 Id. 590; *McDonald v. Crandall*, 43 Id. 231; *Hume v. Gossett*, 43 Id. 297; *Coe v. Smith*, 47 Id. 225; *Bonnell v. Smith*, 53 Id. 377; *Conklin v. Foster*, 57 Id. 104; *Hartwell v. McDonald*, 69 Id. 293; *Kerr v. South Park Commissioners*, 8 Wis. 276; *Lamb v. Shays*, 14 Iowa, 567; *Parker v. Dean*, 45 Miss. 409. It seems, however, that where the homestead, in Illinois, exceeds the amount exempt by the statute, the judgment is a lien upon the excess: *McDonald v. Crandall*, 43 Ill. 231; *Young v. Morgan*, 89 Id. 199; *Raber v. Gund*, 110 Id. 581.

ATTACHMENT LEVIED ON HOMESTEAD, EFFECT OF.—In several of the states it is held that land upon which an attachment has been levied cannot be converted into a homestead before the levy of execution, so as to overreach the lien of the attachment already in existence: *Bullene v. Hiatt*, 12 Kan. 98; *Avery v. Stephens*, 48 Mich. 246; *Kelly v. Dill*, 23 Minn. 436; *Watkins v. Overby*, 83 N. C. 165; *Brooks v. Chatham*, 57 Tex. 31. In the case last cited, Stayton, J., who delivered the opinion of the court, said: "The constitution declares that no lien upon the homestead shall be valid; but it does not declare that property not homestead at the time a lien is acquired may thereafter become homestead clothed with exemption from forced sale to satisfy such pre-existing lien." Freeman, in his work on executions, considers this to be the correct doctrine: Freeman on Executions, sec. 249. But in California and in Nevada it is held that a judgment obtained after a declaration of homestead cannot be enforced against the homestead, notwithstanding an attachment may have been levied upon the premises before the declaration of homestead was filed: *McCracken v. Harris*, 54 Cal. 81; *Sullivan v. Hendrickson*, 54 Id. 258; *Hawthorne v. Smith*, 3 Nev. 182. In Mississippi, if the execution debtor have a family, and be occupying the premises as a homestead when the sale is made under execution, he cannot be thereby deprived of his homestead, although his exemption right accrued after the judgment was rendered, or even after the levy was made: *Trotter v. Dobbs*, 38 Miss. 193; *Lesley v. Phipps*, 49 Id. 790; *Irwin v. Lewis*, 50 Id. 363; *Leitchford v. Cary*, 52 Id. 791; *Jones v. Hart*, 62 Id. 13. And in Ohio, real estate having the character of a homestead when it is about to be levied upon under execution is exempt, although it became such after the rendition of the judgment upon which the execution issued: *Wildermuth v. Koenig*, 41 Ohio St. 180. But in Illinois, property, to be exempt as a homestead, must be shown to have been such when the lien attached. It is not sufficient that it was a homestead at the time of the sale: *Reinback v. Walter*, 27 Ill. 393. In New Hampshire a party cannot hold a place which was not his homestead at the time of the levy of the execution: *Austin v. Stanley*, 46 N. H. 51. Under the Vermont act of 1849, a homestead is exempt from attachment for a debt which was incurred after the purchase and record of the deed, but before the claimant took possession of and occupied it, where he was in possession and occupying when the attachment was put on: *West River Bank v. Gale*, 42 Vt. 27. The head of a family, who, while engaged in moving into a building just erected by him on the only real estate owned by him, for the purpose of being occupied as a family home, is interrupted by an attachment thereof by a creditor, but on the next day completes the moving, and thereafter continues to occupy the premises with his family, is to be considered as having been in the occupation of the premises as a homestead at the time of the attachment, and the homestead cannot be sold under the execution issued upon the judgment subsequently rendered in the case: *Fogg v. Fogg*, 40 N. H. 232; S. C.,

77 Am. Dec. 715. A vacant lot upon which the owner draws lumber, intending to build a home, is exempt as a homestead from attachment levied after he began to build, where he occupied the house as soon as it was finished: *Denville v. Widoe*, 31 N. W. Rep. 533 (Sup. Ct. of Mich., Jan., 1887); *Gilworth v. Cody*, 21 Kan. 702. A homestead purchased with a view to occupying it as such, and which is occupied within a reasonable time, is, from the time of the purchase, exempt from seizure upon execution or attachment: *Monroe v. May*, 9 Id. 466. In *Zimmer v. Pauley*, 51 Wis. 282, where the wife of the owner returned to a room of their former homestead, where she stored a load of furniture, and the purpose for which the husband had removed to another town had failed, and they had in consequence determined to return to the homestead, it was held that the homestead was exempt.

WHERE PART OF HOMESTEAD IS USED FOR BUSINESS, OR IS RENTED to tenants of the owner, it is held by the great weight of authority that the whole of the premises, including the portions so used for business or rented to others, is exempt from sale under execution: *Freeman on Executions*, sec. 244; *Thompson on Homesteads and Exemptions*, secs. 120 et seq.; *Ackley v. Chamberlain*, 16 Cal. 181; S. C., 76 Am. Dec. 516; *Gregg v. Bostwick*, 33 Cal. 220; *Hubbell v. Canaday*, 58 Ill. 425; *Stevens v. Hollingsworth*, 74 Id. 202; *Hogan v. Manners*, 23 Kan. 551; S. C., 33 Am. Rep. 199; *In re Tertelling*, 2 Dill. 339; *Lasell v. Lasell*, 8 Allen, 575; *Mercier v. Chace*, 11 Id. 194; *Orr v. Shroyer*, 22 Mich. 260; *Kelly v. Baker*, 10 Minn. 154; *Umland v. Holcombe*, 26 Id. 286; *Goldman v. Clark*, 1 Nev. 607; *Wright v. Straub*, 64 Tex. 64; *Phelps v. Rooney*, 9 Wis. 70. But in *Tiernan v. His Creditors*, 62 Cal. 286, the premises in question consisted of a lot of land in the city of San Francisco, thirty-five feet front by one hundred and twenty-two and a half feet in depth, which, with the improvements, were of the value of eight thousand dollars. There was on the land a double house, intended for two families, one half of which house only was occupied by the insolvent, the other half having been always occupied by tenants. The house had two distinct entrances, and there was no connection between the two tenements by which a person could go from one to the other. It was held that the tenement occupied by the insolvent was alone exempt. And in *Ashton v. Ingle*, 20 Kan. 670, S. C., 27 Am. Rep. 197, it was held that a house on a lot adjoining the homestead of the owner, in a city, and by him owned and rented to a tenant not in his employ, and occupied exclusively by such tenant and his family, is not exempt under the homestead laws exempting one acre in a city, "with all improvements, . . . occupied as a residence by the family of the owner," although all the land claimed to be exempt is less than an acre. The supreme court of Iowa holds that where some stories of a building are used by the owner and his family as a dwelling, and other stories are used for business purposes or are rented to others, the portions of the building occupied by the claimant as his residence are alone exempt, and that the other portions are liable to sale upon execution: *Rhodes v. McCormick*, 4 Iowa, 368; S. C., 68 Am. Dec. 663; *McCormick v. Bishop*, 28 Iowa, 233; *Wright v. Ditler*, 54 Id. 620; *Mayfield v. Maasden*, 59 Id. 517. This doctrine does not seem to have met with approval in any other state.

MUST HOMESTEAD EXEMPTION RIGHT BE CLAIMED BY DEBTOR? This is a question upon which the authorities differ. In some of the states it is held that the law requires the claimant to do nothing in order to secure the right: *Hughes v. Watts*, 26 Ark. 228; *Pardee v. Lindley*, 31 Ill. 187; *Hoskins v. Litchfield*, 31 Id. 137; *Moore v. Titman*, 33 Id. 368; *Hubbell v. Canaday*, 58 Id. 425; *Helfenstein v. Cave*, 6 Iowa, 377; *Vogler v. Montgomery*, 54 Mo. 584;

Goldman v. Clark, 1 Nev. 607; *Barney v. Leeds*, 51 N. H. 293; *Lute v. Reilly*, 65 N. C. 20; *Taylor v. Rhyne*, 65 Id. 531; *Vannoy v. Haymore*, 71 Id. 128; *Abbott v. Cromartie*, 72 Id. 292; *Lambert v. Kinnery*, 74 Id. 350; *Myers v. Ham*, 20 S. C. 522; see Thompson on Homesteads and Exemptions, sec. 639 et seq. But in other states it is held that the right must be claimed before sale, and if not so claimed, that it is lost: *Bell v. Davis*, 42 Ala. 460; *Williston v. Schmidt*, 28 La. Ann. 416; *Kuntz v. Bachr*, 28 Id. 90; *Livermore v. Bonstelle*, 11 Gray, 217; S. C., 71 Am. Dec. 708; *Herschfeldt v. George*, 6 Mich. 456; *Scars v. Hanks*, 14 Ohio St. 298; *Spitley v. Frost*, 15 Fed. Rep. 299; *Freeman v. Stewart*, 5 Biss. 19. But the homestead right of a defendant is not forfeited by his omission to claim and select it, if, being within reach, he is not notified of the levy or of the proceedings under it: *Griffin v. Nichols*, 51 Mich. 575.

HOMESTEAD EXEMPTION FROM JUDGMENTS FOR TORTS. — A number of cases hold that the homestead is not exempt from sale under an execution issued upon a judgment founded upon a tort: *Meredith v. Holmes*, 68 Ala. 190; *Davis v. Henson*, 29 Ga. 345; *Schouton v. Kilmer*, 8 How. Pr. 523; *Lathrop v. Singer*, 39 Barb. 386; *Whiteacre v. Rector*, 29 Gratt. 714; S. C., 34 Am. Rep. 759. The following cases, however, hold that the homestead is exempt in such cases: *Conroy v. Sullivan*, 44 Ill. 451; *Loomis v. Gerson*, 62 Id. 11; *Cook v. Newman*, 8 How. Pr. 523; *DeBinger v. Tweed*, 66 N. C. 206; *Gill v. Edwards*, 87 Id. 76; *In re Railway*, 3 Hughes, 609. And this is the doctrine supported by the better reason. Lawrence, J., in delivering the opinion of the court in *Conroy v. Sullivan*, 44 Ill. 452, in discussing this subject, said: "The judgment in this case was not strictly a 'debt contracted.' But the law of 1857 declared it to be the object of the legislature to prevent the alienation of the homestead in any case except by the consent of the wife. In the light of both these laws, this court has constantly held that it was the evident intent of the legislature to protect the homestead as a shelter for the wife and children, independently of any acts of the husband. He cannot deprive them of their right to it without the consent of the wife, either by his contracts or his torts. There is no more reason, so far as the wife is concerned, for permitting it to be sold for the husband's tort than for his violation of a contract, and it is the evident policy of the law to forbid its being sold under a judgment and execution in either case." And the homestead is exempt even where the judgment creditor is the state: *State v. Pitts*, 51 Mo. 133; *Ren v. Driskell*, 11 Lea, 642. So, also, where the United States is such creditor: *Salentine v. Fink*, 8 Biss. 503; *Fink v. O'Neill*, 106 U. S. 272. And in Texas it has been held that the homestead is exempt from forced sale for taxes, except such as are levied upon the homestead itself: *Wright v. Straub*, 64 Tex. 64. And it has been held in Arkansas that an alien, being a householder or head of a family, is entitled to have a homestead exempt from execution: *McKensie v. Murphy*, 24 Ark. 155. See Thompson on Homesteads and Exemptions, sec. 90.

WHEN EXEMPTION CEASES. — When no constituent member of a family remains, the homestead exemption ceases to exist, and the property becomes subject to the debts of the last owner: *Burns v. Jones*, 37 Tex. 50.

WHAT TITLE NECESSARY OR SUFFICIENT TO SUPPORT HOMESTEAD: See *McKee v. Wilcox*, 83 Am. Dec. 743, note 745; note to *Pryor v. Stone*, 70 Id. 344, where this subject is fully discussed. A homestead may be claimed in land of which a party is in possession under a contract to purchase: *McKee v. Wilcox*, *supra*. The homestead law protects a possession held under an equitable as well as a legal title: *Tomlin v. Hilgard*, 43 Ill. 302, citing the principal case.

COSTS IN CHANCERY: See *Walling v. Kimard*, 60 Am. Dec. 216, note 219, where other cases are collected. The award of costs in chancery cases is generally left to the discretion of the circuit court: *Northern Ill. R. R. Co. v. Bachs etc. R. R. Co.*, 49 Ill. 357, citing the principal case.

SUPERVISORS OF MARSHALL COUNTY v. COOK.

[38 ILLINOIS, 44.]

BONDS IN AID OF RAILROAD COMPANY, ISSUED BY COUNTY UNDER TOWNSHIP ORGANIZATION, ARE ABSOLUTELY VOID, when the election at which their issuance is authorized is ordered by the county court instead of by the board of supervisors of the county, upon whom the statute has conferred that power exclusively. And the fact that a majority of the legal voters of the county voted at such election in favor of the issuance of such bonds will not give them validity, since the election being illegally called, the vote failed to confer the power.

WHERE STATUTE PROHIBITS ISSUE OF BONDS BY COUNTY UNTIL ELECTION IS HELD resulting in favor of such issue, bonds issued under an election unauthorized by law are void in the hands of all persons, whether subsequent purchasers or first holders, since they are deemed to have notice of the statute under which the bonds purport to be issued, and have access to the proceedings of the board of supervisors, which are public records. And the levy and collection by the county of taxes to pay the interest on bonds so issued does not validate them, for the doctrine of ratification does not apply where there is a want of power in public officers to perform the original act or to ratify it, but only where having such power they execute it defectively.

ASSUMPSIT. The opinion states the case.

S. L. Richmond, and Bangs and Shaw, for the appellants.

Barns and Cummins, for the appellee.

By Court, WALKER, C. J. 'This was an action of *assumpsit*, brought for the recovery of the interest due by a coupon attached to a bond issued by the board of supervisors of Marshall County in payment of subscription to the capital stock of a railroad company. As a defense, the county interposed a plea that on the twenty-eighth day of February, 1853, the county court ordered an election to ascertain whether the county should subscribe one hundred thousand dollars to the capital stock of the Western Air Line Railroad Company; that when the election was held, the county was acting under township organization; that afterwards, and without any further action in holding an election, the board of supervisors passed an order that the county subscribe that sum, which subscription was subsequently made. Afterwards, at the

September session, the board ordered that the bonds of the county issue to the road, in such sums as the company might require, but not less than one thousand dollars each, payable in twenty years, bearing six per cent interest, payable semi-annually; that the bonds be signed by the chairman of the board, and authenticated by the county seal; that interest coupons be attached and the bonds be delivered to the company, when it should indemnify the county against loss, by transmitting the principal and interest to the place of payment.

The plea avers that the bonds were issued in pursuance of the order, but by no other authority. To this plea a replication was filed. It does not deny any averment in the plea. It avers that this and other bonds were indorsed and delivered on the day they were issued to plaintiff; that ever since the bonds were issued, the county has paid interest until the installment falling due on this coupon; that for the purpose of paying the interest, the county has each year levied and collected of the tax-payers of the county six thousand dollars, which has been applied semi-annually in the payment of the interest on these bonds; that certificates of stock were delivered to the county for the amount of the subscription, which are still held by the county; that the county has participated in the election of officers of the road; that the bonds and coupons were transferred before maturity for value, without any notice that the election had been ordered or held under an order of the county court, further than the constructive notice, if any such could be imposed, by the records of the county court and the board of supervisors. To this replication a demurrer was filed, which was overruled, and a judgment rendered for thirty dollars, the amount of the coupon, against the county.

It is virtually admitted that the bond and coupon were irregularly issued, but it is insisted that the subsequent acts of the county render them valid and obligatory upon the county. Also, having been negotiated for a valuable consideration before their maturity, without any other notice than such as the law charges, the county cannot interpose a defense to them in the hands of such a holder. The first of these questions is one of power. And it depends upon the fourth section of the act of 1849 (Scates's Comp. 950), which declares that no subscription or purchase of stock shall be made, or bonds issued, by any county or city, under the provisions of

the act, creating a debt for the payment of such subscription, unless a majority of the qualified voters of such county or city shall vote for the same. It requires a notice of thirty days, giving the time of holding the election, and requiring them to vote for or against the subscription.

The fifth clause of the fourth section of article 16 of the township organization law (Scates's Comp. 337) declares that the board of supervisors shall perform all other duties not inconsistent with the act, which was required or enjoined upon the county courts by any law of the state. Under this provision, which was in force at the time these bonds were issued, the board of supervisors succeeded to all the powers and duties of the county court, and it became their duty to call elections to ascertain whether the county should subscribe stock to a railroad company and issue bonds in payment of the same: *Prettyman v. Tazewell County*, 19 Ill. 406 [71 Am. Dec. 230]. The board having succeeded to this power, the county courts of the various counties acting under township organization ceased to have the power to call such elections.

From these provisions it is manifest that these bonds were issued without such an election as the law contemplates. Nor can an election ordered and held without authority of law be held to answer the requirements of the statute. This is a question of authority and its legal exercise. The statute has expressly declared that the bonds shall not issue unless in pursuance of authority conferred by the vote of a majority in favor of such subscription, at an election called in the mode pointed out by the act. The act has prescribed the manner in which the authority shall be acquired, and declares that bonds shall not issue except in that manner.

The provision of the township organization law operated as an amendment to the law authorizing subscriptions by counties and cities. And when the duty devolved upon the board of supervisors of calling the election, it also prohibited them from issuing the bonds until an election was called and resulted in favor of subscription, precisely as it did the county courts. In counties not acting under township organization, no person can suppose that an election called by the sheriff or a justice of the peace would confer any power on the county courts to issue such bonds, and for the reason that such an election would be unwarranted, and would for that reason confer no power. A legally ordered election is, by the law, made an essential prerequisite to the exercise of the power. And

action by the county authorities without performing such an act is unwarranted, and not only so, but is prohibited.

The provision requiring the election, and prohibiting the bonds from being issued until the question is passed upon and authorized by a vote, was no doubt designed to protect the county from improvident action, and is salutary and proper in its operation. It has been held that in the absence of such authority conferred upon the county agents by an election properly called, they will not be compelled to issue bonds: *Schuyler County v. People*, 25 Ill. 181; *Clarke v. Supervisors of Hancock County*, 27 Id. 305; *Fulton County v. Mississippi and Wabash Railroad*, 21 Id. 373; and *People v. Tazewell County*, 22 Id. 147. And as between the county and the first holder, or in the hands of a person holding such bonds with notice that they were issued without authority, there can be no doubt that they are absolutely void.

Political corporations, in their organization and purposes, are essentially different from private corporations. The former are created to aid in the government of the people, the latter to promote trade, manufactures, and a variety of other interests. They are usually endowed with all the powers and rights of an individual, so far as they can be conferred. And the power to contract debts, and to issue evidences of the same, is an incident usually attending their creation. When authorized to perform an act, unless restrained by their charter, they may employ the means and perform the act in the same manner that might be done by a private individual. This is necessarily so, to effectuate the purpose of their foundation with most private corporations.

Municipal corporations; however, being created for purposes of government, and authorized, as it were, to exercise to a limited extent a portion of the power of the state government, have always been held to act strictly within their charter. It is to them their fundamental law, and their power is only co-extensive with the power granted. Not being essential to the purposes and object of their creation, without an express grant of power for the purpose, they have no authority to contract debts binding upon the body or individuals residing within their limits. Such a power being unusual when they are created, and usually being conferred, if at all, by special enactment, and all persons being familiar with the fact, it is but natural that those who deal with them or in their obligations should see to it that the body possesses the power to bind

itself for their payment. On the other hand, the object of private corporations usually renders it necessary that they should transact such business as may involve the necessity of incurring debts.

Another broad distinction exists between the two classes of corporations. The business and proceedings of a private corporation are not public, whilst those of municipal corporations are open to the examination of the public. All of their proceedings are enrolled, and become a matter of public record, open to the inspection of all persons. On the other hand, the journal of the proceedings of a private corporation is not accessible to the public, or to any one but the members of the body. It then follows that persons dealing with municipal corporations have the right to examine and see whether all the steps required by their charter have been taken. It is otherwise with private corporations. Those dealing with them can only examine their charter, and if it is found that the body had, under any circumstances, power to create the indebtedness, the holder will be protected, unless it appears that he was informed that it was in violation of their charter. But with municipal bodies, whose records are open to examination of all, there is not the same reason to protect a holder, as he may fully inform himself whether their action is warranted.

That such a body may create a debt binding upon it, there can be no question, simply by complying with substantial requirements of their charter, nor will slight or immaterial deviations from the mode prescribed invalidate such securities in the hands of innocent holders for a valuable consideration. Such was the rule announced in *Johnson v. Stark County*, 24 Ill. 75; *Prettyman v. Tazewell County*, 19 Id. 406 [71 Am. Dec. 230]. But on the other hand, if the body assuming to act has no legal authority to create the debt; or if they exceed their authority, or omit some essential prerequisite, the bonds are a nullity: *Schuyler County v. People*, 25 Id. 181; *Clarke v. Supervisors of Hancock County*, 27 Id. 305. And it is upon the principle that there is a wide difference between an act performed without authority, or in violation of law, and an act defectively performed under authority. In the former case the act is absolutely void, whilst in the latter it may become binding by ratification or by mere acquiescence.

As a rule, if not uniform, of very general application, persons dealing with individuals claiming to act for another, or with the officers of the law (and the officers of cities and coun-

ties are of that character), he must see that they have power to act. A person acting under a special authority cannot bind his principal when he exceeds it. A person dealing with one assuming to be the agent of another must, to protect himself, know that the agent has power to act in the premises. He must be able to show that the agent had authority, or he can acquire no rights binding upon the principal.

In case of public officers, from the highest to the lowest, they must act within the scope of their authority, or their acts will be void. And courts, to render their judgments and decrees binding, must have jurisdiction of the subject-matter and of the parties. And the power in all such cases is derived from the law. But having the power, an injudicious or even an erroneous exercise of the authority does not render the act void, but merely voidable. Where a person purchases property at a sheriff's or master's sale, to render his purchase availing, he must show that there was a valid and binding judgment or decree, and an execution in the one case, and an order of sale in the other. It is not sufficient to show an execution without a judgment, or even a judgment, where the court had no jurisdiction of the subject of litigation or of the parties. It is not sufficient that it appears that the officer had, under any circumstances, power to perform the act, but it must appear that he possessed the power in the case in which he performed the act. Nor can the question of the *bona fides* of the transaction be considered. In such cases the bidder purchases at his peril, and so of his assigns. It is a question simply of power, and not of good faith. The maxim *caveat emptor* applies to the acts of public officers.

It would therefore appear that the county agents only acquire jurisdiction or power to act in the mode prescribed by the law. And the law has not only required that an election shall be held resulting in favor of a subscription and the issuing of bonds, to confer the power, but has expressly prohibited them from acting in the absence of such authority. And we have seen that the board of supervisors were alone authorized to call the election, and that the county court acted without authority. And in doing so, the election conferred no more jurisdiction on the board of supervisors than if it had been ordered by the sheriff or a constable of the county: *Schuyler County v. People*, 25 Ill. 181. In this case all of the avenues to information were open to the purchaser. The authority to issue bonds is derived from a public law, which he no doubt

examined, and whether he did or not, he was bound to know its requirements. From it he saw that the board had no power to issue these bonds until an election had been ordered by them and resulted in favor of their being issued. Such an order would, of course, appear upon the public record of their proceedings, to which he had access, as fully as the person proposing to purchase at a sheriff's sale has to the record of the judgment under which the sale is proposed to be made. Nor is it harder to require the purchaser of a bond to examine the record to ascertain whether the board had jurisdiction to act than to require of the purchaser to ascertain whether the court had jurisdiction to render the judgment.

After a careful review of all the reasons which induced the decisions in the cases of *Schuyler County v. People*, and *Clark v. Hancock County*, we have discovered no reason to change or modify the conclusion at which we then arrived. In the first of these cases, the board of supervisors had called the election and issued the bonds, when the law under which they were acting only authorized the county court to call it, and issue the bonds; and it was held that the bonds were absolutely void, even in the hands of Farwell, who, for aught that appears, acquired them in the due course of business, and for a valuable consideration. In the latter of these cases we said: "If an election were held without warrant of law, or if it were ordered by a person or tribunal having no authority, there could be no doubt that the whole proceeding would be absolutely void. Such an election, and every subsequent step, would be unauthorized and void, and therefore incapable of ratification by the county authorities. But an election held under authority of an order of the proper authorities, and in the main conforming to the requirements of the statute, but wanting in some particular, not essential to the power to hold such an election, and acquiesced in by the people, and approved by their agents, the county authorities, would render bonds thus issued binding when in the hands of innocent holders."

Whatever may be held in other states, under statutes differing, no doubt, in some particulars from ours, we feel compelled to hold that an election ordered and held by the body or tribunal authorized by the statute is essential to the exercise of the power. It might be different if the legislature had not prohibited such bonds from being issued until the tribunal had called an election which had resulted in favor of issuing such bonds. To hold otherwise would be to violate a positive re-

quirement of the statute. It would be to set at defiance the legislative will, constitutionally declared, and exercised for the protection of the people who are to be burdened with the debt. To hold bonds issued without an election, or under an election unauthorized by law, is to say that the express will of the legislature shall not be binding, and that acts in violation of express provisions of the statute shall be as effectual as if done strictly in compliance with its requirements.

The holder was dealing in instruments issued by a municipal corporation, and he no doubt looked to the law for their authority; and if so, he saw that they were required to have the election held, and were prohibited from issuing bonds until such a step had been taken. Finding the law required such an election, there was no hardship in ascertaining, by the records of the county, whether the election had been ordered and held by the board of supervisors. In the absence of such an act, there was the want of power to issue the bonds, and we have no hesitation in saying that when so issued they are void in whosoever hands they may be found.

It is a familiar rule that a note given or contract executed for an immoral or an illegal consideration is held to be void in any person's hands. This case, then, presents no greater hardship than a case of that character. It may be said that in the case of *Johnson v. Stark County*, *supra*, the election was held in the same manner as in this case. If such was the fact, it is believed that the question was not argued, and it was not discussed in the opinion of the court. Nor did the court intend or suppose that we were holding that bonds issued under such an election were valid.

It is, however, insisted that these instruments being negotiable, a purchaser before maturity is protected, unless he is chargeable with actual notice. Without stopping to inquire whether all of the citizens of the municipality would not be chargeable with notice of all defects in exercising the power, it is only necessary to say that such is the general rule, subject to some important exceptions. The term "negotiable" means salable or transferable,—that which may be indorsed or assigned so as to vest the legal title to a chose in action in the person to whom it is transferred, so that he may enforce the payment in his own name. Usually the negotiation of such instruments before maturity cuts off all defenses. But instruments prohibited by law, instruments negotiated after maturity, and instruments given for a consideration, *malum*

in *ss*, are not embraced in the protection. Thus it will be seen that an instrument may be negotiable and yet not protected from a defense in the hands of an innocent holder. It does not necessarily follow that because an instrument is negotiable, therefore an innocent holder will always be protected. Almost every description of agreement and contract may be negotiated in equity, and still all defenses may be interposed in such cases. In the case of *Johnson v. Stark County*, 24 Ill. 75, we said that coupons annexed to such bonds were negotiable by delivery, but we did not say, nor did we intend to say, every defense was thereby cut off when the holder might sue. We only held that by sale and delivery the legal title to the instrument was transferred to the holder, and that he might sue in his own name. That was the question presented and decided.

A forged note, a note executed by a person assuming without authority to act as the agent of another, and a note altered in a material part, although they may be assigned or negotiated, are not by that means rendered binding, but the same defense may be made in the hands of the assignee as in the hands of the original holder. Neither does the negotiation of a note with notice of the defense, or of such circumstances as charge the assignee, cut off a defense in his hands.

When we come to see the cases reported in Wallace's reports, we find the supreme court of the United States have not gone so far as we had previously supposed. In the case of *Mercer County v. Hackett*, 1 Wall. 83, it was held that slight and immaterial omissions in ordering the bonds to issue will not render them invalid in the hands of an innocent holder. In that case the recommendation was by the grand jury, the body authorized by law to make it, but they did not make it in the precise language of the law, but it was substantially good. If the recommendation had been made by the petit jury, it would have presented a very different question, and one more like the one under consideration than the one discussed in that case. We do not see that the court could have done otherwise than decide as they did. It was not a question of power to act, but whether the action, defective as it might be, was still in pursuance of the power.

It is supposed that the case of *Gelpcke v. City of Dubuque*, 1 Wall. 175, is in conflict with the views here expressed. It will be observed, however, that so far as the record discloses in that case, the law authorizing the bonds to issue had been

strictly observed in every particular before they were issued. A curative act had likewise been passed by the legislature, declaring the bonds valid and binding. That case does not, like the present, depend upon the power of the body issuing them to act, but upon other and different questions, the principal one of which was the constitutionality of the law. Hence, that case and this differ essentially in the questions presented and discussed.

It is true the court use broad and comprehensive language. They say: "When a corporation has the power, under any circumstances, to issue negotiable securities, the *bona fide* holder has a right to presume they were issued under the circumstances which gave the requisite authority, and they are no more liable to be impeached for any infirmity in the hands of such holder than any other commercial paper. If there were any irregularity in taking the votes of the electors, or otherwise, in issuing the bonds, it is remedied by the curative provisions of the act of January 28, 1857." The court, however, do not intimate that such instruments, issued without power, would be protected in the hands of any kind of a holder. The court proceed upon the ground that the persons issuing the bonds did so in the exercise of a power. And that if there was a defective exercise of the power, the irregularity had been cured by the act of the legislature. There was no intimation that bonds void in their inception—issued in direct violation of law—would be protected. Nor do we believe that court will so hold if the question should ever be presented for their determination.

The language employed by the court does not bear the construction that simply because the instrument bears the form of negotiable paper that therefore the holder, although *bona fide*, is protected. No rule is better recognized in the commercial world than that the forgery of the drawer or indorser's name does not protect the holder, however innocent he may be. Nor do we understand that a note declared by the statute to be void will, in the hands of an innocent holder, be valid and binding; otherwise the statute would be wholly inoperative.

The principle that the holder of an instrument prohibited by statute, although negotiated before its maturity, is not protected, is well illustrated in the case of *Bayley v. Taber*, 5 Mass. 285. In that case the statute had declared all notes, bills, etc., of a particular denomination issued by a banker after a speci-

fied day should be void. It appeared that the notes were issued after that date, but were antedated, so as to appear to have been legally issued; yet the court held they could not be enforced in the hands of an innocent holder. The court say that it is not altogether certain that receivers of such instruments are entirely free from blame, although not privy to the making or antedating of them. The laws of the government, the court say, are presumed to be known to all of the citizens, and "if the notes were in fact made or issued after they were declared void by statute, and after a penalty was attached to passing them, although no penalty is expressly enacted against the receiver, yet the act of receiving them was necessary to enable the offender to pass them. To authorize the holder to maintain a suit and recover judgment on notes of this description so situated, when the legislature has declared them void, would be effectually to annul an act, of the wisdom and policy of which the legislature alone had the right to judge; so in the case under consideration, to permit a recovery would be to defeat the will of the legislature expressed in the clearest manner, that bonds shall not be issued until authorized by an election called in the mode prescribed.

Official acts derive their binding force alone from the law. The uttering of county bonds involves the necessity of levying taxes for their payment, and to that extent deprives the citizen of his property. Under the fundamental principles of our government, that cannot be done except by authority of law; nor is it any answer to say the election resulted in a majority in favor of issuing the bonds, as majorities are as powerless to divest a person of his property as are minorities. That can be either only be done in the manner prescribed by law, and the election being illegally called, the vote failed to confer the power.

If, then, the bonds were issued without authority, they were void, and if void, the mere levy of taxes and payment of interest could not render them valid. In the case of *Schuyler County v. Farwell*, 25 Ill. 181, the board of supervisors had levied and collected taxes for the payment of interest, several installments of which had been paid, and still it was held that the bonds being void, the holder could not recover. We, in this case, make the distinction between the want of power in public officers to perform an act, and a case where they, having power, execute it defectively. In the former case acquiescence and treating it as having been performed in pur-

suance of authority does not render the act valid, whilst in the latter case the defects may be of such a character that the acts might become valid and binding. We are therefore compelled to hold these bonds to be invalid and incapable of enforcement, on the grounds set up in the pleadings. The plea presented a defense, and the replication was no answer to it, and the court erred in overruling the demurrer.

The judgment of the court below must therefore be reversed, and the cause remanded.

Judgment reversed.

TOWN BONDS ISSUED WITHOUT AUTHORITY OF LAW ARE VOID: See *Town of Rochester v. Alfred Bank*, 80 Am. Dec. 746, note 752; *Pettyman v. Timesell Co.*, 71 Id. 230, note 236. Bonds issued by municipal corporations, where there is a total want of authority to issue them, are absolutely void: *Bissell v. City of Kankakee*, 64 Ill. 251, citing the principal case. The omission to comply with the essential requirements of the statute in holding elections to determine whether bonds shall be issued is fatal to the right of the supervisors of the county to issue bonds: *Harding v. Rockford etc. R. R. Co.*, 65 Id. 92, citing the principal case. An election to authorize the issue of county bonds, called by the county court instead of by the supervisors of the county, as required by law, is without authority of law, and bonds issued in pursuance thereof are absolutely void: *Stephens v. People*, 89 Id. 343, also citing the principal case. But if a municipal corporation has power to issue bonds, mere irregularities in the manner of their issuance, not going to the power, will not invalidate them in the hands of an innocent purchaser: *Barr v. City of Carbondale*, 76 Id. 469, citing the principal case.

THE PRINCIPAL CASE IS CITED in *Dart v. Hercules*, 57 Ill. 449, to the point that where the authority of a public officer is a matter of law and public record, it may be presumed that a party dealing with him knew the extent of his authority in the premises; and in *Williams v. Town of Roberts*, 88 Id. 29, to the point that whoever deals in municipal bonds is chargeable with knowledge whether the precedent conditions have been complied with in their issue.

THE PRINCIPAL CASE IS DISTINGUISHED in *Supervisors of Mercer Co. v. Hubbard*, 45 Ill. 142.

JOHNSON v. BAKER.

[38 ILLINOIS, 98.]

SUMMONS SERVED BUT TWO DAYS BEFORE TRIAL, WHERE STATUTE REQUIRES THREE, confers no jurisdiction of the person of the defendant, and a judgment rendered against him upon such a service is utterly void, and can be questioned at any time and in any proceeding, direct or collateral, and no title can be divested or transferred under such judgment.

ALTHOUGH TITLE TO LAND CANNOT BE INQUIRED INTO FOR ANY PURPOSE IN ACTION OF PERSONAL DETAINER, yet a plaintiff seeking to recover in such an action as a purchaser at a sheriff's sale must produce a valid judg-

ment, an execution, and a deed for the premises on a sale by the sheriff under such a judgment. To require him to show that his purchase was legal and valid is not requiring the trial of title in such action.

PARTY PURCHASING AS REDEEMING CREDITOR IS DEEMED TO HAVE HAD NOTICE of the records and proceedings of the court that rendered the judgment under which the sale that he redeems from was made, and if such records on examination would show that such judgment was void, because the court had not jurisdiction to render it, it is his neglect not to have made the examination, and he will be held as much responsible for the consequences as if he had made the examination and had actual notice.

ACTION of forcible detainer commenced before a justice of the peace by Olof Johnson and Samuel Remington against Jonathan H. Baker, and removed by appeal into the circuit court, where a trial resulted in a verdict and judgment for the defendant. The plaintiffs sued out this writ of error. The other facts are stated in the opinion.

John I. Bennett, for the plaintiffs in error.

Frost and Shallenberger, for the defendant in error.

By Court, **WALKER, C. J.** In this case plaintiffs in error claim the right to recover under the act of 1861 amending the forcible entry and detainer law. They recovered a judgment in the Henry circuit court for the sum of \$214.45, against defendant in error. An execution was issued and levied upon the premises in controversy, and they were redeemed from a previous sale by the sheriff, on an execution issued upon a transcript of a judgment from the docket of a justice of the peace, filed in the circuit clerk's office, which was in favor of Ezekiel Husted and against defendant in error. After the redemption, when the property was offered for sale, no person bid more than the amount paid to redeem, and the sheriff struck it off to plaintiffs in error, as the purchasers, and made them a deed in accordance with the statute.

Plaintiffs in error read in evidence the execution, and the sheriff's return thereon, showing a sale under the execution issued on the transcript of the justice's judgment in favor of Husted and against defendant in error. They also offered to read the transcript of the judgment rendered by the justice of the peace, but it was rejected by the court, and plaintiffs in error excepted. The transcript shows that defendant was only served two days before judgment was rendered by the justice of the peace. The transcript does not show that an appearance was entered at the trial before the justice.

This presents the question whether the transcript filed in the clerk's office was such as to warrant a sale and a subsequent redemption by a junior judgment creditor. The statute declares that a summons shall be issued by a justice of the peace, returnable in not less than five nor more than fifteen days from its date, which shall be served at least three days before the trial: R. S. 317, sec. 21. Such a service or an appearance is necessary to authorize a justice of the peace to render a judgment. Neither the necessary service nor appearance was had in this case. The summons was served but two days before the trial, whilst the statute requires three. In the case of *Pardon v. Dwir*, 23 Ill. 572, it was held that the return of the constable failing to show that the justice's summons was read to the defendant, the justice failed to acquire jurisdiction of the person of the defendant, and a judgment rendered in the case was utterly void, and could be questioned at any time and in any proceeding, direct or collateral, and that title could not be divested or transferred under it. That case is based upon previous decisions of this court, and is decisive of this question, as a service for an insufficient period is as inoperative to confer jurisdiction of the person of the defendant as service in some other mode than that required by the statute. They are both void because they fail to conform to and are in violation of the statute. And it follows, as the judgment is utterly void, that such a sale under it would be equally void; and being void, it is not such a judgment as the statute contemplated as the basis of a sale from which a junior judgment creditor might redeem.

It is, however, insisted in answer to this view of the case, that the amendatory act of 1861 was designed to afford a speedy trial free from technicalities, and as title cannot be tried in this action the court should not inquire into the validity of the judgment and sale under which the claim is made. A want of jurisdiction of the person of the defendant has never been held to be merely technical, but is of the substance of a proceeding. It is based upon reason, and is the only safeguard to the fair administration of justice. As the law stood before the passage of this amendatory act, title could not be inquired into for any purpose in this action. Nor can it now, but the plaintiff claiming the right to recover as a purchaser at a sheriff's sale must show that his purchase conformed to the law authorizing the officer to sell. To do this he must produce a valid judgment, an execution, and a

deed for the premises on a sale by the sheriff under such a judgment. When this is shown, the defendant in the execution and judgment will not be permitted to show an outstanding title or in any manner try the validity of the title. When the plaintiff has shown that he is a legal purchaser, and acquired a valid sheriff's deed, the law has said he may recover the possession against the defendant in execution. But to require him to show that his purchase was legal and valid is not requiring the trial of title by the justice of the peace in this action.

The purchaser does not acquire the right to recover by showing that he bid off the land at a sheriff's sale. Until he acquires the sheriff's deed after the redemption has expired, he is only regarded as a bidder. If the sale is not set aside, or a redemption is not made within the period limited for the purpose, he then becomes entitled to the sheriff's deed. And inasmuch as judgments, executions, records of courts and their process cannot, under the rules of evidence, be proved orally, they must be produced as evidence, or at least authenticated copies. To require such evidence is not a trial of title any more than is the production of a lease by a landlord in a forcible entry and detainer. Its production shows a title to possession and estops the tenant from disputing the landlord's title; and the production of a valid judgment, an execution, and sheriff's deed estops the defendant from disputing the title of the purchaser to possession of the land. In neither case does the title to the land come in question, but simply the right to its possession.

Records and proceedings of courts are public documents, to which all persons have access, and of which they must take notice. When plaintiffs purchased as redeeming creditors, they should have examined the transcript from the justice's docket, and had they done so they would have seen the justice had no jurisdiction of the person of the defendant, and that the judgment was unauthorized, and that any sale under it would be inoperative and could confer no title. If they failed to do so, it was a neglect of duty and they are equally responsible for the consequences as if they had made the examination and had actual notice. They will not be heard to say that they did not have the notice, because it was open to their inspection, and entirely accessible to them. They were endeavoring to acquire legal rights by the process of the law, and in doing so they should have conformed to its require-

ments, and seen that other persons had done likewise. The court below decided correctly in rejecting the transcript under which the first sale was made, as there was not such a service as authorized the justice to render a judgment, and for want of a valid judgment all subsequent proceedings, like the judgment, were void and incapable of conferring any rights upon the purchaser under the transcript, or upon their assignees, which plaintiffs are under the statute.

The judgment of the circuit court must therefore be affirmed.

JUDGMENT OF COURT HAVING NO JURISDICTION OF PERSON OR SUBJECT-MATTER IS VOID: See *Butcher v. Bank of Brownsville*, 83 Am. Dec. 446, note 450, where other cases are collected. Where the law requires the summons to be served at least three days before trial, and a trial is had within a shorter time, without any appearance by the defendant, the court does not acquire jurisdiction, and any judgment rendered against him is absolutely void, and may be questioned in any other proceeding, direct or collateral: *Ledford v. Weber*, 7 Ill. App. 91, citing the principal case. If a court had no jurisdiction, all proceedings under its judgment are absolutely void, and a redemption cannot give any validity thereto: *Murvey v. Carpenter*, 78 Ill. 583, also citing the principal case.

WHATEVER IS SUFFICIENT TO PUT PURCHASER UPON INQUIRY and lead to knowledge is notice: *Gibson v. Winslow*, 84 Am. Dec. 552; *Morrison v. Kelly*, 74 Id. 169, note 178, where other cases are collected.

TITLE OF PURCHASER AT SHERIFF'S SALE DEPENDS UPON WHAT: See *Cloud v. El Dorado Co.*, 73 Am. Dec. 528, note 528, where other cases are collected. To recover as purchaser at sheriff's sale, the party must show a valid judgment, execution, and sheriff's deed, and failing in either, he must be defeated: *Johnson v. Bantock*, 38 Ill. 114; *Harmon v. Larned*, 58 Id. 169, both citing the principal case.

PURCHASER AT EXECUTION SALE IS NOT CLOTHED WITH LEGAL TITLE until he has received the sheriff's deed, but has only a lien or equity: *Reynolds v. Harris*, 76 Am. Dec. 459. A purchaser under judgment and execution acquires no new estate, but only a lien, until the expiration of the period of redemption: *Stephens v. Illinois M. F. I. Co.*, 43 Ill. 331, citing the principal case.

FORCIBLE ENTRY AND DETAINER, WHEN TITLE MAY BE GIVEN IN EVIDENCE IN ACTION OF: See *Beeler v. Cardwell*, 77 Am. Dec. 550, note 552, where this subject is fully discussed. Title cannot be tried in an action of forcible detainer, but deeds may be introduced in evidence to show the extent of the possession: *Smith v. Hoag*, 45 Ill. 251; see also note to *Croff v. Ballinger*, 68 Am. Dec. 737.

COOLEY v. SCARLETT.

[38 ILLINOIS, 216.]

IN ILLINOIS, ORAL TESTIMONY IN CHANCERY SUIT MAY BE PRESERVED BY RECITALS IN DECREE, if counsel prefer that method, and an appellate court will no more question the statements in such recitals than it will those of a bill of exceptions in a common-law case. If a circuit judge inadvertently signs a decree containing erroneous recitals of the proof, he may correct it, even at a subsequent term.

PERSON HAVING NO INTEREST IN PROCEEDING NEED NOT BE MADE PARTY THERETO.

COURTS OF ONE STATE CANNOT ANNUL DEED OF LANDS IN ANOTHER STATE duly recorded therein, even though it appear that such deed was fraudulently obtained. But if a court of equity in the former state has acquired jurisdiction of the person of one who has by fraud obtained a deed for land lying in another state and had it recorded there, it may decree that he and his grantees, if the latter is not entitled to be protected as a *bona fide* purchaser, shall release their claims acquired under such fraudulently obtained deed; and if they refuse to do so they may be attached for contempt and held in custody until they execute the decree; and if in the mean time it be made to appear that they are seeking to encumber the title by conveyances to third persons, that may be treated as a contempt for which the court may attach and punish them; and if they go beyond the jurisdiction, the court can appoint a special commissioner to make the conveyance in their stead.

APPEAL from the circuit court of Kane County. The opinion states the case.

B. F. Parks, for the appellant.

C. J. Metsner, for the appellee.

By Court, LAWRENCE, J. One Stephenson had been negotiating with Scarlett, the appellee, for the purchase of land belonging to the latter, situated in the state of Michigan. He was to give Scarlett in exchange a mortgage on certain lands in Bureau County, in this state, and a deed from the appellant, Cooley, to a tract of land in Iowa, which he represented Cooley to hold in trust for him. Scarlett was to convey the Michigan land to Cooley. Scarlett and Cooley both executed their deeds, and these were left with one Johnson as a depository, to remain until Scarlett should be satisfied with the title of the mortgaged lands, and then the deeds were to be delivered. Scarlett was not satisfied with the title, and several times during the month of August demanded back his deed from Johnson, but failed to procure it. In the month of September, Cooley procured the deed from the depository, Johnson, for the Michigan lands, under a pretense that he wished to get from it a description of the lands. He promised to return it,

but instead of doing so, he caused it to be recorded in the state of Michigan, and conveyed the land to Ridder and Perrin, who also caused their deeds to be recorded. Scarlett then filed his bill against Cooley, Ridder, and Perrin, and asked and obtained a decree canceling these deeds. The defendants below appealed.

The facts we have briefly recited are set out with much detail in the decree. It is urged by the appellant's counsel that no such proof was made on the hearing or appears elsewhere in the record. But since the passage of the act allowing oral testimony in chancery, it has been a settled practice, under repeated decisions of this court, to preserve the evidence by recitals in the decree, if counsel prefer that method. We can no more question its statements than we can those of a bill of exceptions in a common-law case. If the circuit judge has inadvertently signed a decree in any case containing erroneous recitals of the proof, he may correct it, even at a subsequent term, on his becoming satisfied that an error in this respect has been committed.

It is also urged that Stephenson should have been made a party. This was not necessary. Stephenson had no interest in this proceeding as it stands on the face of the pleadings and proofs. The object of the bill was, not to cancel a contract with Stephenson, since it proceeds upon the ground that no contract was ever made, but simply to procure the cancellation of an instrument which Cooley had fraudulently got into his possession, and under which he claimed title. It does not appear that Stephenson claimed that the contract between himself and Scarlett had been completed, or that he had any connection with the withdrawal of the deed by Cooley. On the contrary, Stephenson seems to have taken back from Scarlett the note secured by the mortgage on the Bureau land.

We should have no hesitation in affirming the decree if we could regard it, in its present form, as within the power of the court to make. But we cannot. It purports to pronounce null and void conveyances of land situated in the state of Michigan, which conveyances have been duly recorded in the recorder's office of that state. Now, whether these recorded deeds are nullities, even under this fraud, must necessarily depend upon the local laws of Michigan, which we cannot assume to administer. The courts of Michigan may well claim the exclusive right of deciding upon the recorded titles of their own lands, and would be apt to pay but slight regard to this

decree. Suppose a citizen of the state of New York were to bring an action of ejectment in this state against the occupant of a piece of land, and to rebut the title shown by the defendant, should produce a decree of a New York court pronouncing some deed in the defendant's chain of title to be a nullity, and rendered in a proceeding to which the defendant in the ejectment was not a party, would our courts pay any attention to such a decree? Of what avail is a recorder's office if deeds, duly reduced to record, can be annulled by a chancery proceeding in another state, so that innocent purchasers cannot be protected under them? And the object of this decree is to totally annul the title, so as to cut off even remote and *bona fide* purchasers. This cannot be done by a proceeding in this state:

The decree, however, may be remodeled so as to bring it within the principles of chancery jurisdiction and still afford some protection to the complainants. Cooley, Ridder, and Perrin are all personally before the court. There is no attempt to prove that Ridder and Perrin were purchasers for a valuable consideration, and they do not even claim to be so in their answers, which are sworn. Being, then, personally within the jurisdiction of the court, it can compel them personally to execute to Scarlett a release of all claim acquired through the deed from him. If they refuse to do so, they can be attached for contempt, and held in custody until they execute the decree; and if, in the mean time, it should be made to appear to that court that they are seeking to encumber the title by conveyances to third persons, that also might be treated as a contempt, for which the circuit court could attach and punish them. If they go beyond the jurisdiction, the court can appoint a special commissioner to make the conveyance in their stead.

Decree reversed and cause remanded.

COURTS CANNOT BY JUDGMENT OR DECREE PASS TITLE TO LAND SITUATE IN FOREIGN COUNTRY: *Johnson v. Kimbo*, 75 Am. Dec. 781; see also note to *Molynaux v. Seymour*, 76 Id. 665; *Sturgis v. Fay*, 79 Id. 440; note to *Newton v. Bronson*, 65 Id. 95. Title to lands situated in another state cannot be invalidated by a decision of an inferior court in Illinois, and whether the title to such lands is a nullity or not must depend upon the local laws of the state where they are situated: *City Ins. Co. v. Commercial Bank*, 68 Ill. 354, citing the principal case.

IN ILLINOIS, ORAL TESTIMONY IN CHANCERY SUITS MAY BE PRESERVED BY REWRITALS IN DECREE, and the statements in the decree are no more subject to question than those in a bill of exceptions would be in a common-law

case: *Walker v. Carey*, 53 Ill. 477; *Walker v. Abt*, 83 Id. 231, both citing the principal case. And where the decree states that proofs were heard, and then finds the facts, it will be presumed that the evidence justified the finding, unless the evidence appearing in the record fails to prove the facts found: *McIntosh v. Saunders*, 68 Id. 130, also citing the principal case.

ILLINOIS CENTRAL RAILROAD CO. v. SMYSER.

[88 ILLINOIS, 264.]

GOODS PLACED FOR SHIPMENT IN CAR OF RAILROAD COMPANY STANDING ON SIDE-TRACK, under exclusive control of the company, with the assent of the company, pass into the possession of the company, whether they be placed in the car by its own employees or by other persons.

MERE SIGNING OF BILL OF LADING DOES NOT TRANSFER POSSESSION OF FREIGHT to a common carrier, but is merely evidence that he has received the possession, and this fact may be shown by any other legitimate evidence.

LIABILITY OF COMMON CARRIER IS FIXED BY ACCEPTING PROPERTY to be carried, and this acceptance is complete when the property comes into his possession with his assent.

RAILROAD COMPANY MAY, BY SPECIAL CONTRACT, LIMIT ITS COMMON-LAW LIABILITY for loss for injury to property placed in its possession for transportation, being still liable, however, for gross negligence or willful misfeasance. But it cannot restrict its liability by merely proving a usage on its part in giving bills of lading to notify shippers that the company would not be liable for certain kinds of losses.

ASSUMPSIT by Smyser & Co. against the Illinois Central Railroad Company to recover damages for injury to certain cotton belonging to the plaintiffs while in the possession of the defendant. The cotton was partially consumed by fire, communicated, as was supposed, by a spark from a passing engine belonging to the defendant. The cotton was, at the time of the loss, on a car of the defendant, standing on a side-track, where it had been loaded, but no receipt or bill of lading had been given for it. There was a verdict and judgment for the plaintiffs, and the defendant appealed. The other facts appear from the opinion.

McAllister, Jewett, Jackson, and George C. Campbell, for the appellants.

John G. Rogers, for the appellees.

By Court, **WALKER, C. J.** It is insisted in favor of a reversal in this case that the cotton, at the time of its destruction, was not in the possession of the railroad company, either as a common carrier or for safe-keeping; and that the court below

erred in rejecting the evidence of the usage of the company in their business at Cairo. It appears that according to the mode in which this company does business at Cairo, when warehousemen have cotton to ship by rail, they apply to the company for the requisite number of cars, and they are sent on the side-track of the company to the warehouse, and the shipper there loads the cotton upon the cars, makes out a manifest, and leaves it with the agent of the company, who has the bales counted, and if found to be correct, a bill of lading is signed, and the company send a locomotive and remove the cars thus loaded and place them in the train destined for the point to which the shipment is made.

The side-track and the cars belong to the company, and are under their exclusive control. And there is no question that the company placed this car at a point opposite the wharf-boat on which the cotton was stored, for the express purpose of having it transferred from the boat to the car, that they might transport it to the point desired by the shipper. The company had unquestionably the exclusive use and control of their road, side-tracks, and freight-cars; no use could be made of them without the consent of the company. So long as a car remained on their road or side-track it was under their control, and, necessarily, in their possession. They had the right to permit their cars to stand at the point at which this one was placed. The company, at any moment, at least after the car was loaded, had the unquestioned right to remove it to any other part of their road, but the commission merchant had no such right, even if he had possessed the means. He simply had the right to load the cotton on the car.

The wharf-boat, on the contrary, with its contents, was in the possession of the commission men, and the cotton so continued until it was placed in the car. It then passed into the possession of the company as effectually as if it had been delivered in their warehouse. They substituted their car for their warehouse, no doubt for the mutual convenience of all parties. And this, too, with the assent of the company, to promote their interest, in the prosecution of the business for which it was created.

If this was a box-car, the company had the right, as soon as the cotton was placed in it, to have closed and locked it. Or if an open car, they had an equal right to have secured the cotton, and any person interfering with it would have been a trespasser, and the company could have recovered damages

for any injury thus perpetrated. No difference is perceived in receiving freight on the platform of their depot and into their cars at any place on their road or side-track; or whether it is placed there by their own employees or by other persons, so it is done with the assent of the company.

It is not the mere signing a bill of lading which transfers the possession of freight to the company, but it is the evidence that they have received possession. Their possession may be shown by any other legitimate evidence. The liability of the common carrier is fixed by accepting the property to be transported. If, however, goods are placed on his cart, boat, or car, without his knowledge or acceptance, or that of his agent, he is not liable: Angell on Carriers, sec. 140. If the owner or person having the custody of the goods to be shipped never parts with their possession, or does not place them under the control of the carrier, there is no bailment, and consequently no liability incurred: *Id.* But in this case the company, by their acts, accepted the trust. The cotton was not placed in the car without their knowledge, but it was with their express assent. Had the employees of Williamson, Haynes, & Co. placed the cotton on the platform of the depot, with the assent of the company, to be transported, no one would doubt their liability, and yet in principle no difference is perceived.

According to the current of modern decisions, it is competent for a common carrier, by rail, to limit his common-law liability by express contract. It was held in the case of *Illinois Central R. R. Co. v. Morrison*, 19 Ill. 136, after a careful review of the adjudged cases, that railroad companies could restrict their liability by special agreement, they still being held responsible for gross negligence or willful misfeasance. But in that case the rule was restricted to a special contract, nor are we aware that any well-considered case has carried it further. And we have no disposition to do so unless compelled by authority. But this rule of law can have no application to this case, because there is no pretense that there was any special agreement restricting the liability of this company. Their liability cannot be limited by showing that it was the usage of the road to embrace in all bills of lading for the shipment of cotton that the company should not be liable for losses by fire. There was an offer to prove that such had been the usage of the company, and that it was known to shippers. If this had appeared it would not have availed, as nothing but a special agreement could have that

effect: *Western Trans. Co. v. Newhall*, 24 Ill. 466 [76 Am. Dec. 760]. Even to permit it to the extent announced in the case referred to is a relaxation of the ancient common law, which prevented any restriction of the carrier's liability even by contract.

But to merely show a loose usage for an indefinite period, limited to a few persons in one particular locality to change the carrier's duty, is not sanctioned by either the British or American decisions.

The question of diligence is one of fact for determination by the jury. And in this case it was fairly presented for their consideration, and we think the evidence warranted the conclusion at which they arrived. Upon a careful examination of this record, we are unable to perceive any error for which the judgment should be reversed, and it must be affirmed.

WHEN LIABILITY OF COMMON CARRIER COMMENCES, FOR GOODS OR BAGGAGE RECEIVED by him for transportation: See *Hicks v. Nausetuck R. R. Co.*, 83 Am. Dec. 143, note 146, where other cases are collected. Upon a delivery and acceptance of goods for transportation by a common carrier, his common-law liability immediately attaches, and if they are lost by fire while awaiting shipment, the carrier is liable to the same extent as if the goods were in transit, unless his liability has been modified, limited, or restricted with the consent of the shipper or owner of them: *Railroad Co. v. Barrett*, 36 Ohio St. 452, citing the principal case.

COMMON CARRIER MAY LIMIT HIS COMMON-LAW LIABILITY BY SPECIAL CONTRACT: See *Judson v. Western R. R. Corp.*, 83 Am. Dec. 646, note 651, where other cases are collected; *Pennsylvania R. R. Co. v. Schwartzmeyer*, 84 Id. 490.

THE PRINCIPAL CASE IS DISTINGUISHED in *Toledo etc. Ry Co. v. Glavin*, 82 Ill. 518.

SCHNELL v. CITY OF CHICAGO.

[35 ILLINOIS, 332.]

PROBATE COURTS WERE ALWAYS OPEN FOR PURPOSE OF GRANTING LETTERS OF ADMINISTRATION, under the Illinois act in force in August, 1849, and no extraordinary circumstances needed to be shown to authorize a special term to be held for that purpose.

IN COLLATERAL PROCEEDING INVOLVING TITLE TO LAND SOLD BY ADMINISTRATOR, it will be presumed that the probate court which appointed the administrator had before it proof of the facts necessary to authorize it to make such appointment, and to give it power to act in the case, although on a direct appeal or writ of error from the probate proceeding it would be held irregular and set aside.

WHERE PETITION OF ADMINISTRATOR FOR ORDER TO SELL LANDS DESCRIBES THEM CORRECTLY as certain lots in section 33, but the abstract accor-

panying the petition and the inventory from which the abstract is required to be taken describe them as being in section 23, and the order of sale directs the lands in the petition to be sold, namely, lots, etc., in section 23, the notice of sale and the deed made to the purchaser describing the lands correctly, it will be held in a collateral proceeding involving the title that the misdescription of the section was a mere clerical error, not affecting the validity of the sale.

WHERE ADMINISTRATOR GIVES NOTICE THAT HE WILL APPLY AT CERTAIN TERM OF COURT FOR ORDER to sell lands of the estate for the payment of debts, he must file his petition at the term designated in the notice, and if he does not file his petition until a term subsequent to that named in his notice, all the proceedings under it will be void. The presumption is, on such notice, and a failure to file the petition at the term specified, that the application is abandoned. To charge the heirs or parties in interest, it is necessary that the notice should be renewed in all cases where the petition is not filed in pursuance of the notice.

MINOR HEIRS ARE NOT ESTOPPED FROM ASSERTING TITLE TO LANDS of their ancestor, sold by an administrator under a void order, by the mere fact that their guardian received a portion of the proceeds of the sale and applied it to their use, where it is apparent from their nonage, ignorance, and position that they knew nothing of the proceedings of the administrator on the estate, and their guardian never made any settlement with them of his trust, by which they could know the true state of the facts.

WHERE AGENT OF PURCHASER AT ADMINISTRATOR'S SALE ENTERS INTO ARRANGEMENT WITH ADMINISTRATOR that the latter shall sell two lots of land together, if the lots are sold for an inadequate price, the sale will be declared invalid; but where the lots so sold bring an adequate price and no one is injured by the arrangement, the irregularity will be disregarded.

APPEAL from the superior court of Chicago. The opinion states the case.

A. W. Arrington and J. S. Page, for the appellants.

Scammon, McCagg, and Fuller, for the appellee.

By Court, BREESE, J. This was a bill in chancery brought in the superior court of Chicago by the city of Chicago against the appellants, to restrain and perpetually enjoin them from prosecuting an action of ejectment they had commenced in that court to recover the possession of certain premises held by the city and claimed to belong to the city.

The facts of the case are in substance as follows: One Jacob Milliman in his lifetime having a pre-emption right to out-lots 45, 46, 48, and 49, in the canal trustee's subdivision of section thirty-three (33), in town 40 north, in range 14 east, purchased the same in September, 1848, for the sum of \$725, paying one fourth of the purchase-money at the time of the sale, and executing his three notes to the trustees, each for the sum of \$181.25, for the balance, payable in one, two, and three

years. Milliman died in possession of the premises on the eighth day of August, 1849, intestate, leaving five children, all infants. On the 14th of August, 1849, six days after his death, Cyrus Bentley, as public administrator of Cook County, applied for and obtained letters of administration on the estate.

On the 8th of June, 1850, the administrator published a notice in a newspaper of the city, that he would apply at the regular term of the county court to be held on the first Monday in August, 1850, for an order for the sale of all the interest of the intestate in these out-lots "in subdivision section 33, 40 north, range 14," for the purpose of paying the debts of the deceased, "upon a petition and abstract to be then and there presented for such purpose, under the 125th section of the act in relation to wills, etc."

The abstract presented showed outstanding debts against the estate amounting to \$220.12.

In the inventory of the real estate the description of the land is as follows: "Out-lots 45, 46, 48, 49, in section 23, township 40, range 14 east. Title consists in certificate issued by canal trustees to Milliman, that he had purchased the same at \$725, and paid one fourth, and given them notes for balance, payable in one, two, and three years."

The petition is in the usual form; it states, however, that the debts against the estate amount to \$256.68½. The decree of the court ordering a sale of the whole of this property is in proper form and conforms to the petition, except that in the decree the out-lots are described as in section twenty-three (23) instead of thirty-three (33), their true location. The last clause of the decree is as follows: "And it is further ordered that the above proceedings which were had and ordered by the court at the last September term, but which were omitted to be then entered, be now entered *nunc pro tunc* as and for said September term, to wit, of the date of October 5th, one of the days of said term, and to have the same force and effect as if then entered."

Notice of the sale was duly published, wherein it is stated that the interest of the deceased in these out-lots will be sold, "said interest consisting of a canal certificate, on which there remain to be paid, on the sixth day of September, 1851, \$181.25."

Lots 48 and 49 were sold together, and bid off by the city of Chicago, at two thousand five hundred dollars, all which

has been paid. It appears that lot 45 contained about three acres of ground, lot 46 about one acre, lot 48 two and thirty-seven one-hundredths acres, and lot 49 ten acres.

There is evidence going to show that the administrator was waited on by an agent of the city, who prevailed on him to offer these lots together, and not separately, giving an assurance that the city would make a liberal bid for them if so offered. It is also shown that the lots sold for their full value at that time. The guardian of Milliman's heirs, on the 30th of May, 1859, received a deed from the canal trustees, of these four lots, executed to the heirs, and it appears the administrator paid the balance due upon the lots out of the proceeds of this sale to the city, and the notes Milliman had given for the deferred payments were handed to the guardian by the administrator.

It is in proof the heirs were so young at the time of the sale to the city, and for some years thereafter, as not to be presumed to have any knowledge of matters of this kind,—that they were separated, living in different families, and their education neglected.

The city bought the lots for cemetery purposes, and fenced them in 1852. Catharine, the oldest, knew of the sale in 1854, and Caroline in 1860, and Henry about the same time. There is no evidence that David, the youngest, had any knowledge of the proceedings, or of matters growing out of them. The proceeds of the sale paid by the city were appropriated to taking up the notes due for the lots, and the remainder was paid over to the guardian of the children, who appropriated it to their use. The city executed a deed without any consideration, in January, 1853, for two burial lots, part of these premises, to the heirs, being the lots on which their father and mother were buried.

The city has divided this land into a large number of burial lots and sold them to different parties.

The bill prays that the appellants "release, convey, and confirm" to appellees, out-lots 48 and 49, and for general relief, and for an injunction to stay proceedings in the ejectment suit. All which the court decreed.

The case is brought here by writ of error, and is assigned for error,—

1. That the findings of the court are not warranted by the evidence;
2. That the bill should have been dismissed;

8. The decree should have been in favor of the defendants below, or of one or more of them.

On this assignment of errors many points are made, the most important of which we will notice.

It is urged by appellants that all the proceedings in reference to the administration on this estate and the sale of the premises were void, because:—

1. Bentley was never the legal administrator, he having been appointed at a special term of the county court; that the statute requires the terms to be held at the regular time fixed by law and at "such other times as extraordinary circumstances may require," and the record does not show that any emergency had occurred authorizing it to call a special term.

2. That Bentley was neither a relative nor creditor, and the court had no power to appoint him until sixty days after the death of the intestate.

3. That the intestate was an inhabitant of this state, and the application for the appointment of the public administrator was not made by the party interested therein, but by the public administrator himself; and it nowhere appears there was no relative or creditors within the state, to whom administration might have been committed, but the contrary does appear; and therefore the whole proceedings were void for want of jurisdiction.

In support of this position the case of *Unknown Heirs of Langworthy v. Baker*, 23 Ill. 484, is referred to. That was a proceeding by writ of error to the county court, and this court held that the facts not affirmatively appearing which gave the court power to act, the appointment of the administrator was a void act, and consequently the order of sale and the sale made by him of the land were also void.

It has been suggested that the court went too far in that case, —farther than the facts of the case warranted. That as the county court had complete jurisdiction of the subject-matter, it should have been intended those facts existed which properly called into action the power of the court.

If that decision is to be so modified, then these objections, being made in a collateral proceeding, cannot avail, for the court in such a proceeding are bound to presume the county court had before it the facts justifying the appointment of the public administrator as the administrator on this estate. It, perhaps, was going too far in the case cited from 23 Illinois to say the entire proceedings were void, for it was sufficient to say

in the case, it being a direct proceeding to reverse the action of the county court, that the action of that court was not in conformity with the statute. This would have been sufficient to justify the court in the conclusion to which it arrived, on the merits of the whole case. Here, in this proceeding, the courts must intend an occasion had arisen or extraordinary circumstances required the appointment of this administrator. But we believe it has always been understood that the probate court, under the act in force when these letters were granted, was always open for such purpose, and no extraordinary circumstances need be shown. Great injury might result if it were not so. Such, we understand, was always the practice under that law. The statute referred to under the second head of objection, that the court had no power to appoint an administrator until sixty days after the death of the intestate, is the fifty-fifth section. That section provides that the widow shall have preference in the administration, but if no widow or other relative of the intestate shall apply within sixty days from the death of such intestate, the court of probate may grant administration to any creditor who shall apply for the same; and in case no such application be made by any creditor or creditors within fifteen days next ensuing the lapse of the said term of sixty days, administration may be granted to any person the judge of probate may think will best manage the estate; but in cases where the intestate was a non-resident, or without a widow, next of kin, or creditor in this state, but having property within the state, administration shall be granted to the public administrator, and to no other person: *Scates's Comp.*, sec. 55, p. 1190.

Here the intestate was a resident, and the statute seems to require a delay of sixty days after the refusal of the widow or next of kin to administer before a creditor can apply for letters, and if no creditor applies within fifteen days after the sixty days, making seventy-five days from the death, then the judge of probate can appoint any person (and this term would include the public administrator) he might think best qualified to manage the estate.

Now, if it was error to make this appointment before seventy-five days had elapsed, can it be taken advantage of in this collateral proceeding?

Does the record show facts necessary to give the probate court power to act in the case? The application by Bentley for letters of administration was made on the 14th of August,

1849, and the record of the appointment recites the fact that the intestate died six days prior thereto, to wit, on the eighth day of August, 1849, and fails to show there was no widow, next of kin, or creditor entitled to the administration, or that they had refused to administer. The question arises, Must not this court, in this proceeding, presume the probate court was satisfied on those facts? May not the probate judge have received proof thereof before he acted? As there is no law requiring him to preserve such proof in the record, must we not presume such proof was received and on which the judge acted? He had cognizance of the subject; his jurisdiction over it was complete, and if he erred in carrying it out, such error cannot be urged in this collateral proceeding to upset them all. There is not, probably, in the records of all these probate justices, a case to be found wherein the record will show such proof was received before letters were granted to a person not entitled to them, except in certain contingencies. Those records will not show the happening of those contingencies, and the result would be, if this objection is sustained, that nearly all the sales by administrators so appointed throughout the state would be rendered void, to the great loss and injury of thousands who have paid in good faith full value for the property so sold and purchased. On an appeal or writ of error from such proceedings, this court would undoubtedly hold them irregular and set them aside.

It is contended further, that the sale is void for the reason that the lots described in the abstract from the county court, and attached to the petition, are described as "out-lots 45, 46, 48, 49, in section 23," instead of section 33, which is the land in controversy; that the inventory of the real estate of the intestate, from which this abstract is, by law, to be taken, also describes it as section 23, and so does the order of sale itself; hence, it follows there was no order of sale for the land in controversy.

The petition describes the land correctly as in section 33, and the order of sale directs that the land in the petition be sold, namely, lots 45, 46, 48, and 49, in section 23. The notice of the sale contained a true description of the location of the lots, and so does the deed from the administrator to the appellee.

If the intestate was shown to have possessed lands in section 23, or if it had been shown that section 23 had been subdivided into out-lots, numbered as these are numbered, there

might be some ground for the objection. But nothing of the kind is shown, and this misdescription of the section in the inventory and order of sale must be held to be a mere clerical error, not affecting the validity of the sale, since it is clear the proper lots prayed to be sold were sold, and were the lots intended to be sold. The description is as particular in the petition as in the inventory and order of sale, and the lands described in the petition were the lands ordered to be sold.

It is further objected that the notice of the intended application for leave to sell these lots was published June 8, 1850, and that the petition would be presented for an order to sell "at the regular term of the county court to be held on the first Monday of August, 1850."

The records show no presentation of any petition at this term, nor any proceeding in relation thereto, until the sixth day of October, 1850, being the last day of the September term. On this 6th of October, being of the September term, the petition was presented and filed, and the order of sale granted. This order was not entered in fact until the 26th of November, the day before the sale, when it purports to be entered *nunc pro tunc* as of October 6th.

In answer to this objection, it is said by appellee that the administrator did appear at the August term in accordance with his notice, and make the application for leave to sell the lots, and the matter was laid over to the next term; that the administrator so swears; and that his testimony is not controverted.

This question is to be determined, not by oral testimony, but by the record. But as to the oral proof by the administrator, he does not swear that he presented his petition or filed it at or before the August term and for that term. He merely says he appeared with his petition, and the matter was laid over until the next term, no one appearing to respond to the petition. Having the petition in his pocket, and not presenting it and having it filed at that term, was not a compliance with the statute. Who laid the matter over is not stated. Not the court, certainly, for no petition being before it, the court had nothing to act upon. The fact that no parties appeared to respond to it was unimportant, as in such cases there is very rarely any appearance of the opposite party. But the administrator himself proves that the petition was not filed at the August term, for he says, at the next term he thinks it was, he again appeared with his petition, and the same was

filed, and an order of the court was entered granting the application. Of course, if the petition was filed at the next term, which was the September term, it could not have been filed at the August term unless withdrawn by leave of the court, and of this there is no evidence. The record sustains this testimony of the administrator, and showing, as it does, that the petition was not filed until the September term, it never came under the notice of the court until that term.

The question then is, Was such presentation of the petition at the September term, when notice had been given it would be presented at the August term, a compliance with the statute? and if not such compliance, does it not render the proceedings void?

This question has already been determined by this court. The case of *Turney v. Turney*, 24 Ill. 625, is in point.

In that case notice was given by the administratrix that she would apply by petition to the circuit court of Jo Daviess County, at the July term, 1847, for an order to sell the real estate of the intestate. This petition was not filed until the following September term, and this court held that the failure to file the petition at the term specified in the notice and petition, and to have the cause docketed at the July term, abated the proceeding, and before any other steps could be taken the heirs and parties in interest should have been again brought into court by another notice, as if none had been previously given.

We see no reason to depart from this ruling in this case. Had the administrator at the August term filed the petition and docketed the cause at that term, we have no doubt it would have been competent for the court to have continued the cause to a subsequent term, and then granted an order to sell. The presumption is, on such notice, and a failure to file the petition at the term specified, that the application is abandoned. To charge the heirs or parties in interest, it is necessary the notice should be renewed in all cases where the petition is not filed in pursuance of the notice: See also *Morford v. Morris*, decided at this term [not reported]; *Pardon v. Dwire*, 23 Ill. 572.

It is insisted, however, by appellees, that the appellants are estopped in equity from recovering the possession of this property, inasmuch as they have had the money which the administrator received from the city, and the same has been applied to their benefit by their guardian, and cite the case of *Penn v.*

Heisey, 19 Ill. 295 [68 Am. Dec. 597], as controlling this case. In fact, appellees say the case of *Penn v. Heisey*, *supra*, "runs on all fours" with this case.

Some of the facts in that case were similar to facts in this case, but the leading fact there is wanting in this case. In that case it was proved that the plaintiff (and Penn was a lawyer) knew all the facts respecting the sale of the lot by the guardian of Mrs. Penn, and the purchase and conveyance of the other land out of the proceeds, and which they had received and enjoyed, and which, at the time of the trial, were of more value than the lot in controversy. Those plaintiffs knew the condition of the property, the various transfers of it, and of the improvements made upon it. The account of the guardian on his settlement was closely examined and scrutinized by Penn, who made no complaint of its fairness, nor did he take any exceptions to it, and the land conveyed by the guardian to the heirs, purchased by part of the proceeds of the sale of this lot, had been sold by Penn and wife for a large sum of money. This lot also had passed through several parties, none of whom had any notice of any defect of title, and the only defect alleged was that the court had not formally confirmed the sale by the guardian. In this case the proof is abundant that these ignorant appellants, then in their nonage, did not, and could not from their position, know anything of the proceedings of the administrator on the estate of their father, nor did their guardian ever have any settlement of his trust with them by which they could know the true state of the facts, nor with the court appointing, nor was there any circumstance caused by any act of these appellants, which, in our judgment, ought to operate as an estoppel against their claim to recover the possession of these lots. Nor did the appellants receive the money for which the lots sold, as a large part thereof was appropriated to pay for the title.

There is evidence tending very strongly to show these lots were sold together, by an arrangement made with the administrator, by Jones, the agent of the city. Had the lots sold for an inadequate price, we should be inclined to reverse the judgment on that ground, but as they brought a full price and no one was injured thereby, we make no point on that.

On the ground, then, that the petition had abated, by non-presentation at the August term, the order thereon and all subsequent proceedings must be held to be void for want of notice. The decree, therefore, is reversed.

FAILURE TO GIVE PROPER NOTICE OF APPLICATION FOR ORDER OF SALE of decedent's real estate, effect of: See *Gibson v. Roll*, 83 Am. Dec. 181, note 183, where other cases are collected. If notice of the application for an order by an administrator to sell lands of his intestate for the payment of debts has not been served or given in the mode required by the statute, the decrees to sell the lands will be void, and may be questioned in both direct and collateral proceedings: *Haywood v. Collins*, 60 Ill. 387, citing the principal case.

DESCRIPTION OF LAND IN ORDER OF SALE BY PROBATE COURT, WHEN SUFFICIENT: See *Monk v. Horne*, 75 Am. Dec. 94, note 97, where other cases are collected. A correct description in the schedule attached to the notice of intended application to the probate court for authority to sell lands of the intestate may be resorted to if necessary to supply a defect in the petition subsequently filed: *McNitt v. Turner*, 16 Wall. 364, citing the principal case.

JUDGMENT OF PROBATE COURT GRANTING ADMINISTRATION cannot be collaterally attacked: See *Driggs v. Abbott*, 65 Am. Dec. 214. In collateral proceedings the court will presume that the probate court granting letters of administration had before it satisfactory evidence to justify its action: *Hobson v. Ewan*, 62 Ill. 150; *Bostwick v. Skinner*, 80 Id. 154; *McNitt v. Turner*, 16 Wall. 363, all citing the principal case.

THE PRINCIPAL CASE IS CITED IN *Dorlarque v. Cress*, 71 Ill. 331, to the point that in order to constitute a ratification, the act relied upon as such must have been done with full knowledge of the rights of the party, and of the consequences of the act.

MILLS v. GRAVES.

[86 ILLINOIS, 458.]

ESTOPPEL IN PARI IS IMPEDIMENT OR BAR TO ASSERTION OF RIGHT OF ACTION arising by a man's own act, or where he is forbidden by law to speak against his own act. It extends to and binds privies in blood, privies in estate, and privies in law.

EVERY ESTOPPEL TO BE BINDING OUGHT TO BE RECIPROCAL, and should bind both parties, and therefore a stranger can neither take advantage of nor be bound by an estoppel.

ESTOPPEL MUST BE CERTAIN TO EVERY INTENT, and must not be taken by argument or inference. Every estoppel ought to be a precise affirmation of that which creates the estoppel, and not by way of recital.

MERE LOOSE EXPRESSIONS INADVERTENTLY MADE IN IGNORANCE OF PARTY'S RIGHTS, or declarations ambiguous in their character, cannot create a bar to the assertion of the truth.

DECLARATIONS NOT ACTED UPON CAN NEVER OPERATE AS ESTOPPEL. Mere declarations to strangers, unless communicated to and acted upon by the party, will not operate as an estoppel. And generally, when the avenues of information are equally open to both parties, there will be no bar.

OWNER OF LAND HAVING HIS TITLE DULY RECORDED HAS GIVEN ALL INFORMATION of his claim that is required by law.

PLAINTIFF IN EJECTMENT SHOWING TITLE IN HIMSELF AND HIS GRANTOR DULY RECORDED IS NOT ESTOPPED by declarations made by such grantor to the effect that he had conveyed the lands in question to the grantors

of the defendant, who owned the adjoining lands, and that he no longer had any interest in such lands, where such declarations were neither made nor communicated to the defendant or to any of his grantors before their purchase of such adjoining lands, and were not an inducement to such purchase.

ESTOPPEL IN PARS CANNOT BE MADE AVAILABLE IN COURT OF LAW in an action of ejectment.

EJECTMENT to recover the strip of land described in the opinion. The land on each side of this strip belonged to the defendant. Samuel Ellis, the common source of title, in June, 1835, conveyed certain lands to one Hubbard, and in the following August he conveyed certain other lands to one Jones. The strip in controversy lay between the two tracts so conveyed. The immediate grantees of Ellis fenced in the entire land, apparently under the impression that their conveyances included the strip in controversy, but the deeds themselves show that the metes and bounds did not include this strip. Ellis never conveyed this strip until 1852, when he gave a quitclaim deed thereof to one Haven, under whom Mills claimed. The defendant proved that, between the years 1836 and 1849, Ellis had declared to various persons that he had conveyed all these lands to Hubbard and Jones, that he had no longer any interest in the lands, and that he had pointed out the boundary line between Hubbard and Jones, and declared that the lands of the two met on this line. But it did not appear that Ellis's declarations or acts were known to any person through whom the defendant's title passed, or that any such person was misled thereby or induced thereby to believe that he was acquiring title to the disputed premises at the time he purchased. The jury returned a verdict for the defendant, upon which a judgment was entered, and the plaintiff appealed. The other facts appear from the opinion.

J. S. Page, for the appellant.

James L. Stark, Jr., for the appellee.

By Court, **WALKER, C. J.** This was an action of ejectment for the recovery of a strip of land in the northeast quarter of section 34, township 39 north, range 4 east. Both parties claim from Samuel Ellis as a common source of title. Plaintiff produced a regular connected chain of title to the premises in controversy. And a recovery was opposed, upon the ground that Ellis, and those claiming under him, were estopped by matter *in pais* from asserting title. The doctrine of estoppels *in pais*, at this day, seems to be that they are equitable, and

not legal, when they relate to real property. An estoppel is defined to be an impediment or bar to the assertion of a right of action arising by a man's own act, or where he is forbidden by law to speak against his own act. It extends to and binds privies in blood, privies in estate, and privies in law: Co. Lit. 352 a. Lord Coke says that every estoppel, to be binding, ought to be reciprocal, and should bind both parties, and for that reason a stranger shall neither take advantage of nor be bound by an estoppel. That because it concludes a man from alleging the truth, it must be certain to every intent, and must not be taken by argument or inference; that every estoppel ought to be a precise affirmation of that which creates the estoppel, and not by way of recital: Id.

It then follows from this rule that mere loose expressions inadvertently made, in ignorance of the party's rights, or declarations ambiguous in their character, cannot create a bar to the assertion of the truth. And it is a well-recognized rule that declarations which were not acted upon can never operate as an estoppel. They are said to be odious to the law, and it is for the reason that they prevent the assertion of the truth. They are only sanctioned to prevent the perpetration of fraud and to effectuate justice. When a party stands by and sees another acting to his injury, and the owner declares that he has no claim, equity will not permit him afterwards to assert his title to the injury of the person he has thus misled. And cases may be found where mere silence, by the true owner being present and failing to assert his right, when he sees a person purchasing the property, has been held to create an estoppel. But to operate as a bar to the assertion of his right, the acts of the owner must contribute to the injury of the person relying upon the bar before he can be estopped.

Mere declarations to strangers, unless communicated to, and acted upon by the party, will not operate as an estoppel. And generally, when the avenues of information are equally open to both parties, there will be no bar. Nor is the party holding the title bound to seek the other and inform him of his rights, when he is in no default. The owner of land, having his title duly recorded, has given all the information to the purchaser which the law requires. So a person in the actual occupancy of his land gives thereby all the information of his claim which is required, unless specially interrogated. In case, however, he was not in possession, or his title was not recorded, it would be different.

In the case at bar, plaintiff's title was on record, and it was the duty of persons desiring to purchase to examine the title of record, and the presumption is that such was the case. If so, they were fully informed that Samuel Ellis, or any person through whom defendant derives title, never attempted to convey this strip of land. Nor does it appear that any person through whom defendant's title passed was ever misled or induced to believe that they were acquiring title to these premises at the time they purchased. They all purchased by metes and bounds, and acquired all the land they purchased. And by what pretense it can be insisted that those claiming adversely to plaintiff have ever been wronged by any declarations made by Samuel Ellis is beyond our comprehension. When they have no conveyance for the land, have never contracted for its purchase, and never paid anything for it, we are unable to perceive how any fraud has been committed by Ellis in his lifetime. It is true that this strip adjoins the land purchased by defendant in error, but that does not give him title, even if Samuel Ellis did say to some person that he had no claim to the land. Titles to land are not so fleeting as to be acquired or lost with such facility. There is more stability in our tenures than warrants a divestiture by such slight and trifling acts by the owner. That requires more solemn and deliberate action.

Had the acts which were proved constituted an estoppel, it would have been simply an equitable right incapable of assertion in a court of law: *Wales v. Bogue*, 31 Ill. 464. There can be no pretense that mere oral declarations can ever transfer the legal title, and equitable title and demands are not cognizable in a court of law. Even if this were such an estoppel as defendant claims, the legal title is in Ellis's heirs or grantees. After a careful examination of the adjudged cases, we are unable to find that such estoppels can be made available in a court of law. Estoppels relating to real estate, so far as we can find, have been uniformly enforced in courts of equity, and usually by injunction. And this is manifestly in accordance with the analogies of the law. Legal rights of action or defense are allowed in courts of law, whilst those which are equitable are alone cognizable in a court of equity. Equitable titles created by parol, and not within the statute of frauds, can only be enforced in a court of chancery. If such an estoppel operates to transfer title, or to produce that effect, it is upon the principle that an equitable estate has

been created, and not that the legal title has been transferred.

In some cases verbal sales of land are taken out of the statute of frauds, for the purpose of preventing the statute from being used for the perpetration of the fraud it was designed to prevent. So of estoppels relating to the title to land, if the owner does by parol that which operates as a fraud and injustice upon another dealing with the property, equity will not permit him to consummate his fraud by the assertion of his legal title. In *Cochrane v. Harrow*, 22 Ill. 345, this court held that where a person stands by and permits another to purchase land to which he had title, and failed to make it known, such a failure to assert his rights constituted an equitable estoppel. But an estoppel can never be allowed where it would itself perpetrate fraud, work injustice, or fail to protect the innocent. In those states, however, where equitable rights are regarded and equitable relief administered in their courts of law, estoppels are allowed to be asserted in such courts, and their decisions would not apply to our system of jurisprudence.

The judgment of the court below must be reversed, and the cause remanded.

ESTOPPEL IN PAIR, WHAT CONSTITUTES: See *Ray v. McMurtry*, 83 Am. Dec. 322, note 324, where other cases are collected.

ESTOPPELS MUST BE RECIPROCAL: *Cock v. Cock*, 81 Am. Dec. 626; *Alexander v. Walter*, 50 Id. 688, note 702.

ESTOPPEL IS NOT CREATED BY ADMISIONS WHICH ARE NOT ACTED UPON, and are not such as would produce injury to the party to whom they are made: *Driskell v. Mateer*, 80 Am. Dec. 105, note 107.

ESTOPPEL IS DEFENSE AVAILABLE AT LAW IN INDIANA: See *Dickerson v. Board of Commissioners of Ripley Co.*, 63 Am. Dec. 373. Estoppel may be given in evidence in ejectment in New York: *Wood v. Jackson*, 22 Id. 603.

EQUITABLE ESTOPPEL NEVER TAKES PLACE UNLESS PARTY SEEKING TO AVAIL HIMSELF OF IT HAS BEEN ACTUALLY MISLED: *Jewett v. Miller*, 61 Am. Dec. 751, note 756.

NO ESTOPPEL IS TO BE TAKEN BY INFERENCE OR ARGUMENT: *Feld's Estate*, 21 Am. Dec. 454.

ADMISSION BY MISTAKE IS NOT ESTOPPEL: *Stuart v. Ludington*, 10 Am. Dec. 550, note 553.

THE PRINCIPAL CASE IS CITED, among others, in *Reid v. State*, 74 Ind. 262, on a question of estoppel raised but not decided in that case.

CASES
IN THE
SUPREME COURT OF JUDICATURE
OF
INDIANA.

STERLING v. KLEPSATTLE.

[24 INDIANA, 24.]

COURT WILL NOT GENERALLY COMPEL SPECIFIC PERFORMANCE, unless it can at the time execute the whole contract on both sides, or at least, such part of it as the court can ever be called upon to enforce; but this rule is subject to some exceptions, and among the exceptions are the cases of contracts where the consideration is entire, but the performance separate.

SPECIFIC PERFORMANCE OF CONTRACT WHEREBY ONE PARTY SELLS TRACT OF LAND to another, and puts him in possession, agreeing to execute to him, on payment of the purchase-money, a title bond, conditioned for the execution of a deed, as soon as he, the vendor, obtains his deed, will be decreed in the vendee's suit to compel the execution of the title bond, where he alleges therein the payment of the purchase-money.

SUIT for specific performance. The opinion states the facts.

W. N. Crane and W. S. Smith, for the appellant.

L. M. Ninde and R. S. Taylor, for the appellee.

By Court, GREGORY, J. Suit by Klepsattle against Sterling, to enforce the specific performance of a contract. It is averred in the complaint that on the 15th of February, 1858, the plaintiff purchased of the defendant certain described land, for the sum of fifty dollars, and that the defendant put the plaintiff in possession of the premises, and agreed with him to execute a title bond therefor on the payment of the purchase-money, conditioned for the conveyance thereof to the plaintiff as soon as the defendant got his deed for said land; that the plaintiff has fully paid the defendant for said land,

and demanded the title bond, which the defendant refused to execute, etc.

A demurrer was overruled to the complaint. The defendant answered in two paragraphs, amounting substantially to the general denial. Trial by jury; special findings, on which the circuit court decreed specific performance of the agreement charged in the complaint.

The evidence is in the record, and makes a strong case for the plaintiff; and the only question in the record is, Has a court of equity power to decree the specific performance of such an agreement?

It is urged that this contract is one and indivisible, and therefore the plaintiff has failed to show that he is entitled to specific performance, as complete relief cannot now be obtained, the defendant not having the legal title to the land.

The rule that a court will not compel specific performance unless it can at the same time enforce the whole contract on both sides, or at least such part of it as the court can ever be called on to enforce, is subject to some exceptions.

In cases of contracts where the consideration is entire, but the performance separate, the rule does not always prevail.

The case of *Avery v. Langford*, 1 Kay, 663, was this: "In 1852 the plaintiff, Avery, was a general merchant, residing in Boscastle, in Cornwall, and trading in coals, timber, building materials, lime, corn, malt, manure, and other articles of general merchandise, and the defendant, Langford, was also a general merchant at Boscastle; and litigation having arisen between them as to the boundary of certain lands belonging to the plaintiff and defendant, it was compromised upon the terms contained in a written agreement, entered into between them in March, 1852, which were, in effect, that the plaintiff should purchase of the defendant, for the sum of sixteen hundred pounds, all the defendant's lands at Boscastle, within certain limits, free from encumbrance; Mr. Langford to enter into bond conditioned to pay as liquidated damages to Mr. Avery the sum of two thousand pounds if the said Langford be, after the twenty-ninth day of September next, concerned in any trading establishment within the district comprised between Morwenstow and New Quay, and Launceston and Bodmin. This was a suit by Avery for specific performance of this agreement. Decree: specific performance, with costs; the form of the bond to be settled in chambers, if the parties differ." When it is remembered that a court of equity will

restrain by injunction the violation of such an agreement, and perhaps decree specific performance, *Beard v. Dennis*, 6 Ind. 200 [63 Am. Dec. 380], this case bears a strong analogy to the case at bar.

Mr. Fry, in his work on specific performance, on the authority of the case of *Grangeville v. Betts*, 19 L. J. Ch. 82, says: "But where the contract is to do a thing, and to execute a deed for that purpose, and this deed is not merely incidental, but, so to speak, covers the whole of the executory part of the contract, the court will, it seems, enforce the contract by the execution of the deed, though the acts to be done be future, and to be done from time to time."

In the case of *Ogden v. Ogden*, 4 Ohio St. 182, it was held that an agreement to execute a mortgage to pay money at a future day would be specifically decreed.

A deed of defeasance will be required to be executed when, by fraud, accident, or mistake the grantee has failed to execute it: *Joyner v. Statham*, 3 Atk. 389; *Young v. Peachy*, 2 Id. 258; *Walker v. Walker*, 2 Id. 99.

We take it for granted that the defendant, as he put the plaintiff in possession of the land, and agreed to make a conveyance when he got his deed therefor, was, at the time, the equitable owner of the land, with the right of possession, and as the record shows this, and that the defendant would not be entitled to his deed for some time thereafter, we think that a specific performance may be decreed. The purchase-money being fully paid, a title bond, with the right of possession, will forever, under our statute (2 Gavin and Hord's Statutes, sec. 596, p. 283), protect the plaintiff in his possession, and make the deed of conveyance more a matter of form than otherwise. We think substantial justice was done in this case: 2 Id., sec. 101, p. 122.

The judgment is affirmed, with costs.

LEWIS v. PRENATT.

[24 INDIANA, 32.]

APPELLATE COURT WILL NOT GO OUTSIDE OF RECORD and hear oral proof of proceedings of a lower court.

GARNISHING IS NOT ESTOPPED FROM DENYING INDEBTEDNESS TO DEFENDANT, by reason of the fact that before the suing out of the writ, he, the garnishee, had admitted to plaintiff that he was indebted to the attachment defendant, and that, if garnished, he would pay the money to the plaintiff.

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ATTACHMENT. The opinion states the facts.

C. E. Walker and H. C. Newcomb, for the appellant.

S. Major, for the appellees.

By Court, FRAZER, J. This was a proceeding against Lewis, as garnishee. He answered, denying all indebtedness, etc., at any time, to the principal defendant in the suit. To his answer the plaintiffs replied, in estoppel, that before the filing of the affidavit in garnishment, he admitted and represented to the plaintiffs that he had made a certain purchase of property of one Bingham, which really belonged to the principal defendant; and that a portion of the purchase-money remained unpaid; and that if the plaintiffs would garnishee him, Lewis, he would pay the same to the plaintiffs, by means of which, before Lewis paid such purchase-money, the plaintiffs were induced to and did prosecute the proceedings in garnishment, etc. Lewis demurred to this reply; his demurrer was overruled, and upon this ruling error is assigned, and this is the only question arising upon the record of the court below. But, before proceeding to its consideration, there is a novel question of practice in this court which must be disposed of.

The appellee joins in error, and, after submission, pleads specially to the assignment of error, and in bar thereof, that, upon the trial below, Lewis was permitted to offer evidence that he was not indebted to the principal defendant, whereby the plaintiffs were deprived of the benefit of their estoppel. The appellant moves to strike out this plea. The issue of fact which it tenders would involve an investigation here, to ascertain by oral proof what evidence was admitted in the court below; and as the record does not show any objection by the appellees to any evidence offered below by the appellant, in consequence of which we must presume that no such objection was made, we have the appellee claiming here that he virtually withdrew his reply in estoppel. This course of practice has never, that we are aware of, been attempted in a court of errors. For what was done in the court below we must look only to the transcript of its record. Every part of its action can thus appear, if the parties avail themselves of the use of bills of exception; and where this has not been done, it would be strange if the omission can be supplied by making issues of fact here, upon the trial of which we are to learn what was done below. We cannot inaugurate such a practice, and accordingly, we direct the second paragraph of

the appellees' answer here to be stricken out. Indeed, we would do this on our own motion, or wholly disregard it.

We now come to the question in the record. The matter alleged by way of estoppel falls very far short of being such. It consists merely of the admissions of the garnishee, and that the plaintiffs were induced thereby to commence their proceedings against him as garnishee. When by the admission of a fact which is not true one draws another into a line of conduct from which he cannot recede, and which must result to his injury, if the fact be otherwise than it was represented, the party making the admission will not afterward be permitted to show the truth to be otherwise, for the reason that he would thereby perpetrate a fraud upon the party whom he had misled.

It is difficult to see how the doctrine could apply against a garnishee, as such. He must answer under oath, and to estop him from answering truly would be to require him to commit perjury. And, then, the proceeding seems designed to enforce only the rights of the principal defendant against the garnishee, and apply them to the satisfaction of the plaintiff's demand against him; and is not, probably, designed to enable the plaintiff to compel the performance of additional obligations which have arisen in his own behalf against the garnishee. But we need not, and do not, place the present decision upon either of the grounds last alluded to. It is sufficient that the facts pleaded do not, at any rate, constitute an estoppel. The plaintiff parted with no right, and relinquished no security; he stood exactly as he did before the appellant made the representations to him, in all his relations with the whole world, except that he commenced his proceedings of garnishment, and thereby incurred costs. And the record informs us that the appellant at once offered, in open court, to repair the injury by confessing judgment for such costs. We think that the demurrer should have been sustained.

The judgment is reversed, with costs, and the cause remanded, with directions to proceed according to this opinion.

THE PRINCIPAL CASE IS CITED to the point that the admission of a garnishee before suit that he is indebted to the debtor in attachment will not estop him, when summoned as garnishee, to deny that fact: *Warden v. Baker*, 54 Wis. 61.

RUBOTTOM v. MORROW.

[34 INDIANA, 202.]

ADMINISTRATOR NEED ONLY ADOPT SUCH PRECAUTIONS AGAINST LOSS OF PROPERTY BY FIRE as prudent men are, under similar circumstances, accustomed to exercise; and therefore, where it appeared that mill-owners were not accustomed to insure, it was held that an administrator, receiving a mill as part of his decedent's estate, was not liable, on its loss by fire, for failure to insure.

ADMINISTRATOR IS NOT CHARGEABLE, ORDINARILY, WITH RENTS OF REAL ESTATE which accrued during his administration.

REAL ESTATE, UNLESS OTHERWISE DISPOSED OF, GOES TO HEIRS, and not to the executor, and a mere power given to the executor to sell real estate does not give him a right to the possession thereof; but to entitle him to such possession, the land or its usufruct must be expressly given to him by the will.

SUIT against administrator for waste and maladministration. The opinion states the facts.

N. B. Rairden, G. Holland, and C. C. Binkley, for the appellant.

J. D. Howland and L. Barbour, for the appellee.

By Court, FRAZER, J. This was a suit against an administrator with the will annexed, for waste and maladministration. The judgment below was for the defendant. The cause was tried by the court, a jury having been waived. The facts were found specially, and we think that the evidence was sufficient to justify the findings.

But there are two questions of law in the record which demand our consideration.

1. A mill, which was leasehold property, was destroyed by accidental fire, being at the time it was burned let to responsible parties, who, by the terms of their lease, were bound to repair, but who became insolvent, so that the money was not made upon their liability, though it was reduced to judgment. It is contended that the administrator ought to have kept the property insured, and that he is liable for having neglected to do so. No authority is cited for this proposition, and we know of none. What little there is in the books, so far as our search and that of counsel has extended, is the other way: Williams on Executors, 1638; 2 Harrison's Digest, 2998. These works cite *Bailey v. Gould*, 4 Younge & C. 221.

But we think, with the judge who tried the case below, that the administrator ought to be held to adopt such precautions against loss of property by fire as prudent men are, under

similar circumstances, accustomed to exercise to indemnify themselves against the like casualty. This would be but reasonable care, and ordinarily an administrator is held to that. The decided weight of the evidence was that mill-owners in that region were not generally in the habit of insuring, in consequence of the high rates of premium demanded.

2. Was the administrator in this case chargeable with the rents of the real estate accrued during his administration? Ordinarily he would not be, but here there was a will, and the question depends upon it.

The provisions of the will are as follows: "The dwelling-house and lot (except that part of it occupied by a store, which stood thereon), with certain specified village lots, were devised to the widow, who is plaintiff in this suit. Certain specific bequests were also made, and to the widow an annuity of five hundred dollars. The residue of the estate, "both real and personal," was given, in equal parts, to a nephew and sister of the testator. It was directed that the nephew, one John J. Rubottom, who was made an executor (with two other persons), should, with the counsel of his co-executors, continue the business of milling and merchandising, as the testator had conducted it, and had endeavored to instruct John J. The real estate not specially devised to the widow consisted of a house and lot used in connection with the mill for a miller's dwelling, a warehouse, and a storehouse, with the ground upon which they stood, and which were used in conducting the mercantile and milling business, and also several tracts of farming lands.

The law is too well settled for controversy, that real estate, unless otherwise disposed of, goes to the heirs, and not to the executors, and that a mere power given to the executor to sell real estate does not give him a right to the possession thereof; that to entitle him to such possession, the land or its usufruct must be expressly or by necessary implication given to him by the will. Such is not the testament in the case before us. A portion of the real estate was by it expressly given to the widow, and the residue of the estate, "both real and personal," subject to specific bequests, was disposed of to the nephew and sister of the testator, thus clearly indicating an expectation on his part that it would not be necessary even to sell all the real estate. Except as to such of it as was necessary for the mercantile and milling operations, there is nothing whatever

upon which to rest the implication that the testator intended that the executor should take possession of the real estate or receive its rents and profits. It is true that the wife's annuity was a charge upon it, for the satisfaction of which it might be necessary to sell it, but the right to its possession and profits does not by any means result therefrom: *Doe ex dem. Clendenning v. Lanus*, 8 Ind. 441 [56 Am. Dec. 518]. It may fairly be implied that John J. Rubottom, as executor, should use the storeroom, warehouse, and miller's dwelling in conducting the milling and mercantile business as he was by the will directed to do. He became executor, and did so until his resignation, when the appellee was appointed administrator with the will annexed. This right, if implied, was incident to the authority to conduct the business directed. But as we understand the will, that authority was personal to John J. Rubottom, ceasing when he ceased to be executor, and did not continue as it would if given to the executors generally in the hands of the administrator *de bonis non*: 2 Gavin and Hord's Statutes, 489.

The judgment is affirmed, with costs.

LIABILITY OF EXECUTOR OR ADMINISTRATOR FOR LOSS OF PROPERTY. —

It is not meant to discuss here the liability of executors or administrators for losses in the course of the management of the estate, as from bad investments, failure of duty on the part of the representative, and the like. But there are cases in which property comes fully into the possession of the executor and administrator, and is afterwards wrongfully taken from him or lost by accident or casualty, and it is these which we wish to consider.

Executors and administrators are usually compensated in the United States for their services in care of the property, and they are therefore held liable for property coming to their possession, as ordinary bailees for hire, and are bound to use the ordinary care which a prudent man would bestow on his own property: *Mikell v. Mikell*, 5 Rich. Eq. 220; *Twitty v. Houser*, 7 S. C. 153; and they are held not to be insurers against losses by accident and casualty not the result of their own negligence: *Mikell v. Mikell*, 5 Rich. Eq. 220; though it was held otherwise in England: *Cross v. Smith*, 7 East, 258; but this case was overruled in the late case of *Job v. Job*, L. R. 6 Ch. Div. 562, where it is decided (on the ground that these officers are not compensated in England) that their liability is that of gratuitous bailees, and that they are responsible only in case of willful default.

The executor or administrator is certainly not liable for loss of goods taken by the public enemy: *Read's Case*, 5 Coke, 34 a; *Wentworth's Executors*, 234. Where goods were stolen by burglars from the possession of the executor, it was held that he was not liable for their loss: *Jones v. Lewis*, 2 Ves. Sr. 240. In *Stevens v. Gage*, 55 N. H. 175, where funds were deposited in a safe and were stolen by robbers, the executor was held not liable. Funds deposited in a bank, and lost through the insolvency of the bank, were held not chargeable to the executor: *Twitty v. Houser*, 7 S. C. 153. In *Bailey v. Gould*, 4

Younge & C. 221, it is held that the representative of a decedent's estate is not bound to insure or continue insurance on the property of the estate, and will not be liable if he fail to insure and the property is lost. Where an executor in the exercise of ordinary care delayed for four months selling a valuable bird, for the purpose of obtaining a better price for the estate, and the bird died, he was held not liable. The cases upon this topic are few, but these instances illustrate the extent of liability under such circumstances of loss as show no negligence on the part of the executor or administrator.

INDIANA AND CINCINNATI R. R. Co. v. GUARD.

[24 INDIANA, 222.]

IN INDIANA, RAILROAD COMPANIES ARE REQUIRED BY STATUTE TO FENCE THEIR ROADS, and the law so providing is construed as a police regulation for the safety of the public; and therefore the fact that a railroad runs alongside of a public highway would seem to require peculiar care on the part of the company in complying with the law.

LEGISLATURE, IN RE-ENACTING LAW WITHOUT CHANGE OR AMENDMENT, is deemed thereby to adopt the construction placed upon it by the courts.

ACTION for value of an animal killed by defendant's locomotive. The opinion states the facts.

D. S. Major, for the appellant.

W. S. Holman, for the appellee.

By Court, RAY, J. The questions presented by these records are identical. The pleas in the one case are but copies of the papers filed in the other, differing alone in the date of the occurrence and the value of the animals killed. The rulings of the court were the same in both cases. A statement of the pleadings, the judgment, and the facts in the one case will therefore be sufficient.

The appellee instituted a suit for the value of an animal killed by the locomotive of the appellant, where the railroad was not fenced. The defendant answered by one paragraph, to which a demurrer was sustained. Defendant then filed three additional paragraphs to his answer, to the third of which a demurrer was sustained. Trial upon the other issues, and judgment for the plaintiff.

The complaint charges that said railroad company, on the eighteenth day of February, 1864, was running a train of cars on said railroad, in Dearborn County, Indiana; that said locomotive and train struck and ran over and killed a brown mule belonging to said plaintiff, of the value of three hundred dollars; and that said railroad was not, at said time and place

where said mule was killed, fenced in by said defendant, in manner and form as in the statute provided.

The first and third paragraphs of the defendant's answer are substantially the same, the third being intended to be a little more specific, and it will, therefore, only be noticed. This paragraph alleges "that said mule was killed on the track of said railroad between Lawrenceburgh and the line dividing the states of Indiana and Ohio, and that, at the time of the construction of said railroad, the said defendant acquired the right of way for said road over a strip of ground one hundred feet wide from Lawrenceburgh to the state line aforesaid, and was still in possession and had control of the same at the time of killing said mule; that there was a state turnpike road or public highway along the west side of said strip of ground or right of way adjoining thereto; that at the time of killing said mule, said plaintiff suffered and permitted said mule to run at large upon said public highway, well knowing that said public highway adjoined said right of way of the said defendant; that said mule strayed from said highway upon said railroad track and was killed; and that, at the time of the killing, said locomotive and train were run and conducted with prudence and care."

The first act of the legislature on the subject of railroad companies fencing their roads will be found in the laws of 1853, page 113; the next, amendatory of the former, will be found in the laws of 1859, page 105, and the last, which repeals all former laws, will be found in the laws of 1863, page 25.

This court, in the cases of *Madison & I. R. R. Co. v. Whitneck*, 8 Ind. 217, *Indianapolis & C. R. R. Co. v. Townsend*, 10 Id. 38, *New Albany and Salem R. R. Co. v. Tilton*, 12 Id. 3 [74 Am. Dec. 195], and *New Albany & S. R. R. Co. v. Maiden*, 12 Id. 10, held "that the act of March 1, 1853, is in the nature of a police regulation, designed to promote the security of persons and property passing over the road, and hence, though the owner of the animal be not an adjoining proprietor, and be guilty of negligence in permitting it to stray upon land adjoining the road, he may recover if the company has failed to comply with the requirements of the statute."

The legislature, with this construction given to the act by repeated decisions of this court before it, has carefully avoided, in the amendments it has made to the act, any material change that could relieve it from the force of these rulings.

We must regard the legislation upon this act as fully adopting the construction placed upon it, and whatever views we may entertain as to the proper interpretation of the language of the statute, still, after such repeated and uniform construction has been given to it, and the makers of the law have so plainly acquiesced in this construction, we do not feel at liberty to discuss its correctness. The cases under consideration present no new points for decision. The railroad company was bound to fence its road, and the fact that it ran alongside of a public highway, construing the law as a police regulation for the safety of the public, would seem, in the case at bar, to require particular care in complying with the provisions of the act.

The judgments are affirmed, with three per cent damages in each case, and costs.

DUTY OF RAILROAD TO FENCE, AND VALIDITY OF LAWS REGULATING FENCING OF RAILROADS: See *New Albany & S. R. R. Co. v. Tilton*, 74 Am. Dec. 195, and note 200. A railroad company is without doubt liable for stock killed or injured at a point where it is required by law to fence its track, and has not done so: *Louisville N. A. & C. R. R. Co. v. Zink*, 85 Ind. 219; and this without reference to the question of its own negligence or of fault on plaintiff's part: *Jeffersonville M. & I. R. R. Co. v. Ross*, 37 Ind. 549, both citing the principal case.

LEGISLATURE IN RE-ENACTING STATUTE WITHOUT CHANGE OR AMENDMENT is deemed to adopt construction put upon it by the courts: *Indianapolis & C. R. R. Co. v. McKinney*, 24 Ind. 285, citing the principal case.

CROSSLEY v. O'BRIEN.

[24 INDIANA, 325.]

VERDICT RENDERED IN PLAIN AND DEFIANT OPPOSITION TO ALL EVIDENCE ought instantly to be set aside.

IN DETERMINATION OF PUBLIC UTILITY OF PROPOSED HIGHWAY, while it is necessary to consider the wants of the particular neighborhood which desires it, yet the interests of the community outside of such neighborhood ought not to be disregarded.

IN DETERMINATION OF PUBLIC UTILITY OF PROPOSED HIGHWAY, damages which, if it were established, would have to be paid for the land appropriated ought to be taken into consideration.

THAT IS NOT TO BE DEEMED HIGHWAY OF PUBLIC UTILITY which, if established, would render unfit for use another of much greater importance, as, for example, an important line of railway, or make the transit of passengers upon the latter seriously dangerous.

GROUND USED FOR RAILWAY OWNED BY PRIVATE CORPORATION, if it can be appropriated at all, in whole or in part, under the right of eminent domain, cannot be so appropriated without being paid for.

APPEAL LIES FROM DECISION OF COUNTY BOARD, UPON PETITION FOR HIGHWAY, to the effect that the road should not be established unless the petitioners would pay damages fixed by the viewers, who reported that the road would not be of public utility, and assessed damages in favor of certain of the persons through whose lands it would pass.

IN PROCEEDING TO ESTABLISH HIGHWAY, OBJECTION THAT NAMES OF PERSONS THROUGH WHOSE LANDS IT WILL PASS are not sufficiently denoted in the petition is waived if not made before the appointment of viewers, especially if not made by such persons themselves.

IF VIEWERS APPOINTED TO LAY OUT HIGHWAY FIND "INCLOSURE" ON ROUTE petitioned for, the owner of which will not consent that the road shall be located through it, and they ascertain that a good route for a road can be otherwise had, they cannot locate the road through such inclosure; nor can they locate it upon such other route if such route would be an essential departure from the route mentioned in the petition.

IF REPORT OF VIEWERS APPOINTED TO LAY OUT HIGHWAY IS SILENT CONCERNING INCLOSURE on the route, it will be presumed that there is none, or that the owner has given the consent required; and the same presumption will be entertained where the decision of the county board has been appealed from, and tried by a jury, and a general verdict has been rendered for the petitioners.

COURSE OF PROCEEDING REQUIRED BY STATUTE WHEN INCLOSURES INTERFERE is not prerequisite to the jurisdiction of the county board to establish a highway.

JURISDICTION WILL NOT BE DEEMED TO HAVE BEEN ACQUIRED BY COUNTY BOARD to establish a highway unless the facts necessary to give the jurisdiction appear affirmatively on the record; but when the jurisdiction has been obtained, the same presumption will be indulged in favor of the regularity of all subsequent proceedings as is entertained in ordinary cases in courts of general jurisdiction.

PETITION for establishment of a public highway. The opinion states the facts.

G. H. Voss, T. A. Hendricks, and O. B. Hord, for the appellants.

D. Moss, J. O'Brien, and B. K. Elliott, for the appellees.

By Court, **FRAZER, J.** This was a petition for the establishment of a public highway. Upon remonstrance, the board of commissioners appointed reviewers, who reported that the proposed road would not be of public utility, and also assessed the damages of John Crossley at fifteen dollars, of Gustavus H. Voss at five dollars, and the P. & I. R. R. Co. at one hundred dollars; and thereupon the board dismissed the petition unless the petitioners would open and maintain the road at their own expense. The petitioners appealed to the court of common pleas, where the question of the public utility of the road, and of the damages of the remonstrants, were submitted to a jury.

The verdict was, that the proposed road would be of public utility; that Crossley's damages would be twenty dollars, and that neither Voss nor the railroad company would be entitled to any damages. Over a motion for a new trial by the remonstrants, there was judgment upon the verdict, and the remonstrants appeal to this court.

This judgment must be reversed. The verdict, upon the subject of damages especially, seems to have been rendered in utter defiance of all the evidence, and the court below should not have hesitated an instant to set it aside. Upon that subject there was no real conflict, and the evidence itself appears on its face so reasonable and obviously true that we cannot doubt our duty. As to Voss, the evidence was that between four and five acres of his land, renting for four dollars per acre, would be occupied, and two thousand rails would be required to fence it. There is no evidence whatever that the road would benefit him. As to the railroad company, the proposed road is, for a distance of about two miles and three quarters, to run ten feet from the east rail of the railroad, except where fills and grades will prevent, thus occupying thirty feet of their right of way, the use of a part of which is absolutely necessary for railroad purposes. In many places the ditch would occupy all the space between the railroad and the proposed highway, rendering it impossible to fence for the protection of the railroad track. The property and trains of the company would thus be constantly endangered, and the use of its railroad be dangerous to passengers upon it. There is nothing whatever to indicate that the railroad company would derive any advantage from the proposed highway, nor is it easy to conceive how that would be possible. In such a state of facts, a verdict finding that the company would sustain no damage whatever is surely not to be permitted to stand, unless the court is, in all cases, wholly to refuse to exercise that authority over the verdict which it is as much its duty in a clear case to exercise as it is to try the case at all.

Upon the question of the utility of the proposed road, it appeared that it would be dangerous to the public to use it so near to the railroad; that there were other routes, equally eligible in other respects, free from that objection, and which would not interfere with the corporate franchises of the railroad company. Now, in determining the question of utility, it is, of course, necessary and proper to consider the wants of a single neighborhood. But we must also look beyond that. It

would be absurd to shut our eyes to the interests of the whole community outside of the particular neighborhood which needs the sought-for highway; and it would be impossible to say that that was a highway of public utility which would be of great convenience to the people of a small given territory, but the establishment of which would either render unfit for use another highway of vastly greater public importance, or put in serious danger the many thousands of people having occasion to use that other more important way. In a legal sense, this railroad is such a public highway, though owned by and operated for the profit of a private corporation. It may be true that it is subject to the great sovereign right of eminent domain, and that it might be taken from end to end for a common public road, if it can be supposed to be possible that the public would, on the whole, be benefited thereby. But in the very nature of things, that state of facts would scarcely exist, unless no other practicable route for such common road could be had. And so, under like necessity, and where the interests of the great public required it, it may be that the franchises of the corporation, to a greater or less extent, might be taken for public use, and appropriated to a common highway. But in either case, the property of the corporation, like that of a citizen, must be paid for. The constitution of the state requires it, and neither courts nor juries have any power or right, in law or morals, to say otherwise. And then the amount of such compensation becomes, in the very nature of things, an element to be considered in determining the question of public utility. Will it cost the public more than it will be worth? In the case in hand, the evidence discloses no fact tending to show any necessity whatever for interference with the franchises of the corporation. So far as there is any evidence upon that subject (and the *onus* was upon the petitioners), it tends to show that another and a better location for the road could be had which would equally well accommodate the neighborhood. But it is needless to pursue the subject. Enough has been said to show that, in view of the well-settled doctrines of the law touching the matter, the finding of the jury upon the question of public utility was clearly against the evidence.

Whether existing law authorizes, under any circumstances, the taking of any part of the property of the P. & I. R. R. Co. for a common highway, it is not necessary now to determine. Assuming that it may be taken (an opinion to which we in-

cline), we have indicated, in general terms, the circumstances which would authorize it, and that they necessarily enter into the question of the utility of the proposed highway.

A number of other questions are agitated in the briefs, which may be shortly disposed of.

We are of opinion that the petitioners had a right, under the statute, to appeal from the action of the board of commissioners, as they did: 1 Gavin and Hord's Statutes, p. 364, sec. 26.

The petition represented that the lands of "—— Weaver," and others named, would be affected by the proposed road. Inasmuch as it appears in the record elsewhere that the lands of three Weavers,—Michael, Benjamin, and Peter,—all of whom are petitioners, would be affected, we think the defect in the original petition is cured; and at any rate, objections of that character, if not made before the appointment of viewers, ought not, we think, to be entertained afterward, especially if made by other parties.

Section 16 of the highway act, 1 Gavin and Hord's Statutes, 363, which prohibits the viewers from locating a highway through an inclosure without the owner's consent, unless a good way cannot otherwise be had, is intended for the government of the viewers, and if they find such inclosure upon the route petitioned for, the owner of which does not so consent, and they find, upon examination, that a good route for a road can be otherwise had, the statute makes such facts an absolute bar to the establishment of a highway there, and the viewers are not possessed of a roving commission which gives them authority to locate a road in any place materially, if at all, different from that mentioned in the petition. The statute which requires them to locate it on the best ground ought not to be held to authorize them essentially to depart from a definite route petitioned for. When the report is silent as to the interference of any such inclosure, it would be in accordance with the rule applicable in other cases to assume that there was no such inclosure, or that the owner had given the requisite consent. When the case is appealed, and tried by a jury, a general verdict for the petitioners ought to be regarded as covering that question. Where, as in this case, the questions of utility and of damages only are put to the jury, and the remonstrants do not ask that the question concerning inclosures shall be also submitted, we think it too late for them to raise any question about it afterward. The statute is silent as to the practice, and that which prevails in ordinary suits is not

exactly applicable to the subject. But there must be a practice, and the sooner it is settled the better. It approaches very near to legislation to do it, and yet we cannot avoid it. That which we have indicated seems simple, furnishing an easy mode of reaching the merits, and giving little opportunity to defeat the establishment of highways, unless they ought to be defeated. We regard the course required by the statute, where inclosures interfere, as a thing not necessary to give jurisdiction, but a proceeding in the matter after the jurisdiction has been obtained. All the facts necessary to give jurisdiction in a road case must affirmatively appear by the record, else the jurisdiction will not be deemed to have been acquired. But as to proceedings in the cause after jurisdiction to proceed has been obtained, the same presumption in support of their regularity will be indulged as in ordinary cases with courts of general jurisdiction. This is a well-established principle, and the conflict in the cases upon the subject, which must have perplexed every lawyer who has had occasion to examine them, has resulted from losing sight of the distinction between the facts required to entitle the tribunal to take jurisdiction and those occurring afterward in the exercise of jurisdiction.

The judgment is reversed, with costs, and the cause remanded for a new trial.

WHEN FACTS CONFERRING JURISDICTION UPON COUNTY BOARD to open highway appear, the same presumptions in favor of the regularity of its proceedings are indulged in as in ordinary cases in courts of general jurisdiction: *Porter v. Stout*, 73 Ind. 8; *Miller v. Porter*, 71 Id. 525; and to the same effect, in substance, see *Board of Commissioners v. Markle*, 46 Id. 113; *Spaulding v. Baldwin*, 31 Id. 377, all citing the principal case.

APPEAL LIES FROM DECISION OF COUNTY BOARD dismissing petition for opening and maintenance of highway: See *Smith v. Scarce*, 34 Ind. 288, citing the principal case.

IN ESTIMATING DAMAGES FOR TAKING LAND FOR HIGHWAY, benefits to complainant from proposed way may be considered: *Hagaman v. Moore*, 84 Ind. 500, citing the principal case.

OBJECTION THAT NAMES OF PERSONS THROUGH WHOSE LAND HIGHWAY WOULD PASS do not appear in the petition must be made before appointment of viewers, or it is waived: *Gross v. Elliot*, 86 Ind. 59, citing the principal case.

JENNESS v. JENNESS.

[24 INDIANA, 355.]

GENERALLY, DOMICILE OF WIFE IS DETERMINED BY THAT OF HUSBAND; but where there has been a final separation of husband and wife, and they have their actual permanent residence in different states, the domicile of the husband cannot be regarded as fixing that of the wife, so as to confer or oust the jurisdiction in a suit for divorce.

RESIDENCE OF DEFENDANT IN STATE IS NOT NECESSARY IN ACTION FOR DIVORCE in Indiana to enable him to file his cross-petition and obtain affirmative relief.

ACTION for divorce. The opinion states the facts.

D. D. Pratt and D. P. Baldwin, for the appellant.

Dickey and Blake, for the appellee.

By Court, FRAZER, J. The appellant filed his petition against the appellee, his wife, for divorce. The wife answered, and also filed a cross-petition, praying a divorce in her own behalf, and thereupon the appellant dismissed his petition, and answered the cross-petition by a general denial. Upon trial, the court found the facts specially, and its conclusions of law thereon, and decreed a divorce to the wife, with eight hundred dollars as alimony. The husband appeals. The special findings, so far as need be set forth to exhibit the questions before us, are as follows:—

That the parties were lawfully married some eighteen or twenty years ago; that they have never had a child; that the wife has, for most of the time since her marriage, been an invalid; that the plaintiff was guilty of mistreating her, as charged in the cross-petition, and that she is entitled to a divorce and eight hundred dollars alimony; that she resolved three years ago last fall to part from him and go to live with her father and brother in the state of Pennsylvania, and accordingly left at that time with her father, and has been living ever since with her father and brother in that state, without any intention of returning to this state to reside here; that she never did return, except to defend this suit, last fall and at the present time, and to prosecute her cross-petition, and intends to return to that state on the conclusion of the present trial, and the conclusions of law upon these facts are:—

1. That the court has jurisdiction to try and determine the cross-petition, by reason of having acquired jurisdiction to try the petition of the plaintiff, and that the dismissal of that

petition does not oust that jurisdiction, and that it was not necessary for the wife to allege or prove that she was a *bona fide* resident of the state for one year previous to filing said cross-petition.

2. That if it were necessary, the wife has not lost her domicile in Miami County, Indiana, by reason of her residence in Pennsylvania, and is to be deemed and taken as a resident of the same county with her husband (because of his domicile here), and for the purposes of this suit.

Proper exceptions to the conclusions of law of the court below present two questions for our determination.

1. In case of final separation of husband and wife, and their actual permanent residence in different states, is the domicile of the husband to be regarded as fixing that of the wife, so as to confer jurisdiction in a divorce case?

In the view we entertain of the case before us this question is not now important. But it is in the record, and has been argued by counsel, and it is probably our duty now to decide it.

The general rule undoubtedly is, that the domicile of the wife is determined by that of her husband. This rule results from the legal identity of husband and wife, constituting them one person in law, and from her duty to dwell with him. But it is argued on behalf of the appellant that the identity of domicile is a presumption which may be rebutted in a divorce case; that any act of the husband which entitles the wife to a divorce immediately discharges her from any obligation to dwell with him; that in such a case she must separate from him to preserve her legal rights, or the cohabitation will be a condonation of the act; and that when the duty of dwelling together ceases, the presumption must also cease.

There is much force in this argument, and it is not without direct authority to support it. In *Schonwald v. Schonwald*, 2 Jones Eq. 367, it was held that "the maxim that the domicile of the wife follows that of the husband cannot be applied to give jurisdiction." And it was decided that, at any rate, the statute of North Carolina requiring three years' residence there before a party could sue for divorce meant actual residence, — a living there in fact; that any other construction would defeat the purpose of the statute, which was to prevent the residents of other states from obtaining, in the courts of that state, divorces, when they could not obtain them at home. But precisely the contrary doctrine has been held in Massachusetts. In *Greene v. Greene*, 11 Pick. 410, the husband, while residing

in Rhode Island, abandoned his wife, and removed to Massachusetts, she continuing for five years to reside in Rhode Island, when she went to the county of his domicile in Massachusetts, and immediately sued for a divorce *a mensa et thoro*. The statute required a residence in Massachusetts to give jurisdiction. The jurisdiction was sustained upon the ground that the domicile of the husband, as a matter of law, determines that of the wife. But in *Harteau v. Harteau*, 14 Id. 181 [25 Am. Dec. 372], the wife, after being deserted by her husband in New York, returned to her former home in Massachusetts to live, and afterward filed her libel there for divorce, the husband still retaining his domicile in New York. A decree was refused for want of jurisdiction upon other grounds, but it was ruled that the maxim "that the domicile of the wife follows that of the husband" cannot be applied in such a case to oust the court of jurisdiction; that the law will recognize the wife as having a separate existence, separate interests, and separate rights in those cases where the object of the proceedings is to show that the marriage relation itself ought to be dissolved; otherwise the parties would stand on very unequal grounds, as the husband could change his own domicile at will, and thus, in many cases, deprive the wife of all opportunity of enforcing her rights. In full accord with this doctrine is the case, in our own state, decided at an earlier date, of *Tolen v. Tolen*, 2 Blackf. 407 [21 Am. Dec. 742]. In that case the parties resided in Kentucky when the cause of divorce arose. The wife afterward removed to this state, *animo manendi*, and brought her suit for divorce, the husband never having resided here; and it was held that the court had jurisdiction. The doctrine of that case has been universally adopted in practice here ever since, and it must be considered settled. It is a denial of the most essential municipal authority to say that a state has no jurisdiction to determine, according to its laws, the social *status* of the people residing in good faith within it; and in doing so it may, perhaps, incidentally affect that of people dwelling in other states. There is no principle upon which the two Massachusetts cases above mentioned can be reconciled, unless it be that the wife, for the purposes of such a suit, may have two domiciles in separate states, either of which gives jurisdiction. With great respect for a court always ranking among the very first for the profound learning and high character of judges composing it, we cannot assent to this proposition. Under a statute like ours,

especially, which requires a *bona fide* residence here for a given time to confer jurisdiction in the first instance, we must forget the purpose of the statute itself, and the just limits which the universally recognized principles of public law impose upon every state, in exercising the power of regulating the domestic relations, before we can be prepared to hold that one who never dwelt here is at liberty to appeal to our court as a plaintiff seeking divorce. To do so would be to substitute a constructive residence for that actual *bona fide* dwelling here, *animo manendi*, which it was the purpose of our legislature to require.

2. The remaining question depends upon the construction to be given to our statute of divorces. It is, whether upon cross-petition by a non-resident our courts have jurisdiction to grant divorce where the original cause was within the jurisdiction?

Section 6 of our divorce act provides that "divorces may be decreed," etc., "on petition filed by any person who, at the time," etc., "shall have been a *bona fide* resident of the state one year previous to the filing of the same, and a *bona fide* resident of the county at the time of filing such petition." By the eleventh section a mode is provided for giving notice to the defendant when not a resident of this state, and by section 14 it is enacted that, "in addition to an answer, the defendant may file a cross-petition for divorce, and when filed the court shall decree the divorce to the party legally entitled to the same. If the original petition be dismissed after the filing of a cross-petition, the defendant may proceed to the trial of the cross-petition, without further notice to the adverse party." These provisions must be construed together, and if it can reasonably be done, full effect must be given to each of them.

A brief review of our recent legislation concerning divorces may aid us. In 1852, we permitted any resident of the county to apply to our courts in that county for a divorce, and his own affidavit of such residence was made, *prima facie*, sufficient evidence of it. Under that act such monstrous abuses were practiced, to the injury of unsuspecting husbands and wives in other states, that our statute became a reproach to us abroad. The mischief was not that parties residing elsewhere came to the domiciles of their husbands or wives here, and, in response to their applications for divorce, obtained decrees on their own behalf, on cross-petitions filed. Quite otherwise. It was that persons from other states, leaving home upon pretended visits of business or pleasure, never in-

tending to domicile here, and, in many cases, not remaining a day among us, and sometimes not even entering our borders at all, had, by the barest frauds and perjuries, procured divorces in our courts. As the fourteenth section then stood, the dismissal of the petition carried the cross-petition with it, and enabled a plaintiff, who must be defeated by the resident or non-resident defendant upon cross-petition, by dismissing his petition as often as a cross-petition was filed, to annoy and perhaps exhaust the defendant so that finally no defense would be made. In a case like the one before us, where the defendant is a wife residing in a distant state, it is easy to see that this consequence might easily be, and how non-resident defendants might be outraged. The protection of the rights of the people of other states, and a regard for the good name of our own state abroad, demanded imperatively that both sections 6 and 14 should be amended so as to shut the door against these mischiefs and abuses; and accordingly, they were amended in 1859, and put in the form which we have copied in a preceding part of this opinion. It is due to our character as a state to say that this remedial legislation has put an effectual check upon the pre-existing state of affairs, and that it is believed that the judges of our *nisi prius* courts, by being careful to require proof of the facts which give jurisdiction, and our prosecuting attorneys, by vigilance in opposing divorces, as the law requires, whenever the defendant makes default, are quite as successful in preventing the fraudulent practices of which we have spoken as are the tribunals of most of our sister states. If these continue, they will be chargeable, not to our laws, but to those who are intrusted with their administration.

It must be quite apparent that to hold the requirement of a year's residence applicable to defendants, as well as petitioners, is not only to give section 6 a construction not required by its language, but also to make it conflict with the general terms of section 14. Nor is this all. A consequence would be, that in two cases precisely alike in their facts, the defendant in one being a resident, and in the other a non-resident, the former might result in a decree for divorce on cross-petition, with such alimony as ought to be given where the plaintiff is in fault; while in the latter, that vindication of character which can often be secured only by a decree could not be had by the defendant, nor could the alimony be adjusted upon the basis of the fact that the defendant was the

party aggrieved. Such a discrimination against non-resident defendants finds no place within the letter of the statute, still less in its spirit, and a construction which would allow it would invite, in the class of cases in which they could be most successfully perpetrated, the very worst abuses which the amendment of section 14 was intended to prevent.

So far as the decree affects the *status* of the plaintiff, who is a resident, and imposes upon him a pecuniary liability for the alimony allowed, which will be effective here, we suppose there can be no doubt that it was competent for an Indiana court to go, if it proceeded according to our laws. Whether the courts of Pennsylvania will regard the social condition of the defendant as having been changed, is not a question for us. It is to be regretted, however, that questions of that class have not been always dealt with upon general principles of public law rather than maxims of local policy.

Upon the question in hand, we concur with the learned judge below, in his conclusion of law, "that the circuit court had jurisdiction to try and determine the cross-petition," etc., "and that it was not necessary for the defendant to prove that she was a *bona fide* resident of this state for one year previous to filing said cross-petition."

Thus, while our statute is intended to prevent non-residents from making use of our courts to perpetrate frauds upon their unsuspecting wives or husbands, by coming here to petition for divorces, it at the same time arms them with every weapon of defense which is afforded to our own people when brought into court at the suit of those whose *bona fide* residence here gives us jurisdiction. As we construe the statute, section 14 is the complement of section 6, and both together are well calculated to protect non-residents, prevent abuses, and promote the enlightened administration of justice in divorce cases.

The judgment is affirmed, with one per cent damages and costs.

DOMICILE GENERALLY: See *Gilman v. Gilman*, 83 Am. Dec. 502, and notes. Domicile of husband as domicile of wife: See *Beard v. Knox*, 63 Id. 125, and note. The rule that the domicile of the husband is the domicile of the wife does not apply in cases of desertion by the husband: *Dutcher v. Dutcher*, 39 Wis. 659, citing the principal case.

JURISDICTION IN DIVORCE CASES IS ACQUIRED if one party reside within the territory, though the other is a non-resident: *Hood v. State*, 56 Ind. 270; *People v. Dawell*, 25 Mich. 272, both citing the principal case. As to jurisdiction over foreigners in divorce cases generally, see the notes to *Hanover v. Turner*, 7 Am. Dec. 206-209, and *Tolen v. Tolen*, 21 Id. 747-752.

FITZGERALD v. ADAMS EXPRESS COMPANY.

[24 INDIANA, 447.]

COMMON CARRIER IS NOT BOUND TO RECEIVE MONEY FOR TRANSPORTATION unless it is properly secured and addressed.

REFUSAL OF COMMON CARRIER TO COUNT MONEY TAKEN FOR TRANSPORTATION, at the request of the consignor, will not create any presumption against him as to the amount contained in the package.

RECITAL IN COMMON CARRIER'S RECEIPT, GIVEN FOR PACKAGE OF MONEY in a sealed envelope, that it is "said to contain" a given amount, is not *prima facie* evidence that the package did in fact contain the amount named.

ACTION against common carrier for failure to deliver certain moneys. The opinion states the facts.

H. W. Harrington and C. A. Korbly, for the appellant.

J. E. McDonald, A. L. Roache, and D. Sheeks, for the appellee.

By Court, *RAY, J.* Complaint for a failure to deliver to the consignee of the plaintiff one hundred dollars. The defendant is charged with having received the same as a common carrier. Answer, denial. Trial by jury, and finding for defendant.

Exceptions were taken to instructions of the judge before whom the cause was tried, and to the overruling of the motion for a new trial, and it is insisted that the finding of the jury is not supported by the evidence. The evidence introduced by the plaintiff was, that he took to the office of the defendant, in the city of Madison, \$1,182.15 in currency, and requested Burke, the agent of the defendant, to count it, saying, "Here is a one-thousand-dollar bill," holding the same in his hand, "and you can count the rest." The agent replied, "No, we don't count money here." The money was placed in an envelope, the plaintiff could not recollect whether by himself or by Burke, and the envelope was closed by wetting the gum upon it. The package was addressed by Burke. The envelope was introduced in evidence, with the wax seals and stamp of the company upon it. The plaintiff also introduced evidence to show that when the package was received in New York City by the consignees, it was by them opened at one end, and the money taken out and counted, and the package found to contain only \$1,082.15.

The receipt given by the company contained these words: "Received of William A. Fitzgerald one package, sealed, and said to contain \$1,182.15, addressed," etc.

The evidence introduced by the defendant was that of Burke, the agent, who stated that he declined to count the money because it was against the rules of the company. That the plaintiff placed the money in the envelope, and inclosed it by wetting the mucilage and closing down the envelope; that he, Burke, took the package, sealed up as it was with the gum, and directed it as Mr. Fitzgerald requested, and does not know what amount of money was in the package. Burke placed one wax seal upon the envelope before the plaintiff left the office, and had all the seals on before he had gone fifty steps away. The package was placed in the iron safe, which was locked, and the only key kept in the possession of the agent, and the money sent in the morning, sealed up in a bag with wax seals and locked in an iron safe. The wax was impressed with the seal of the office at Madison. The packages sent from Madison were checked off in Cincinnati, and resealed in a bag, and placed in a safe, and sent to New York in care of an agent. One duplicate key was in Cincinnati, and one in New York. The agent who accompanied the package had no key to the safe in his charge. Upon cross-examination, the agent stated that he "had the chance to count the money, if he wished, but that they did not count money, as it would make the defendant liable."

The plaintiff requested the court to instruct the jury as follows:—

"A written receipt, or bill of lading, given by the agent of the company, stating that the company had received from the plaintiff 'one package, sealed, and said to contain \$1,182.15, addressed to Andrews, Giles, Sanford, & Co., 70 and 72 Franklin Street, New York, to be forwarded,' is *prima facie* evidence that the plaintiff did deliver to the defendant such package [containing said amount of money], addressed as aforesaid; and if you believe from the evidence that said package was delivered to such agent of the defendant, at the time alleged, and was not sealed, but was open, and that the plaintiff requested said agent to count said money, and see that there was the sum of \$1,182.15 therein, but that said agent then and there refused to count said money, but sealed up the package without counting it, such a state of facts may be considered by you as evidence tending to show that said amount of money was in the package [and the burden would thereby be thrown on the defendant to show by a preponderance of evidence, and to your satisfaction, that said sum of money was not in said package when the same was delivered to said agent]."

The court gave the instruction, except the portion included in brackets. The last part of the instruction was correctly refused, as it required the defendant to show to the satisfaction of the jury that the sum of money was not delivered to the agent. This would permit the plaintiff to recover upon *prima facie* evidence, unless the defendant could not only rebut a presumption, but establish his defense to the absolute satisfaction of the jury. The plaintiff is not entitled to the benefit of a doubt created by the evidence.

The court gave these instructions to the jury:—

"1. If the jury find from the evidence that the company delivered the package to the consignees intact, as received by said company, the company is not liable further as a common carrier.

"2. The plaintiff charges that on the — day of October, 1863, he delivered to the defendant, in the city of Madison, Indiana, a package of money, containing \$1,182.15, which the defendant, as a common carrier, received and agreed to deliver to Andrews, Giles, Sanford, & Co., at 70 and 72 Franklin Street, New York, and that defendant did not deliver said package as stipulated, containing \$1,182.15, but only delivered \$1,082.15. The defendant takes issue upon these averments, and upon this issue, the burden of proof rests upon the plaintiff to show, by a preponderance of evidence, that he did deliver to the defendant a package of money containing \$1,182.15, as charged in his complaint. If this fact is established to your satisfaction, the burden of proof is upon the defendant to show that the package containing \$1,182.15 was delivered as stipulated.

"3. The receipt given by the agent of the defendant for the package of money when it was delivered has been offered in evidence, and there is a difference of opinion between the opposing counsel as to the construction to be given to that receipt. The counsel for the plaintiff insisting that the receipt is *prima facie* an admission that the defendant received from the plaintiff \$1,182.15, and devolves upon defendant the burden of proof to show that that amount was not received. We think, gentlemen, that the receipt should be interpreted like any other contract between parties, and that the language used should be given its ordinary construction; and the language of the receipt does not, in our opinion, amount to an admission on the part of the defendant that the package contained \$1,182.15.

"4. There is testimony tending to show that it is a rule of

the Adams Express Company (the defendant) that the agents of the company shall not count money packages, but receipt for the package as sealed, and said to contain a specified sum. We think a company may organize as a common carrier, and establish such a rule, and it will then be optional with the public to patronize it or not."

The plaintiff excepted to the giving of these charges.

It is insisted by the appellant that the use of the word "intact" in the charge set out second in order was improper, as the primary meaning of the word is "untouched." If the jury so understood the word used, it would require the company to deliver the package "untouched," as it was received, to the consignees. We are at a loss to discover how so strict a rule applied to the defendant could injure the plaintiff on the trial. The objection, however, has no merit, as the jury had, doubtless, sufficient intelligence to arrive at the proper meaning of the word from the context.

The only questions presented by the instructions, then, are, whether the court properly refused to instruct the jury that the words "said to contain," in the receipt, were *prima facie* evidence of the amount actually inclosed in the package; and whether the refusal of the agent to count the money when requested threw the burden of the issue upon the defendant. The rule is well settled, that before any inference can be drawn from the passiveness or silence of a party, the circumstances must be such as not only afforded him an opportunity to act or speak, but such as would properly and naturally call for some action or reply: 1 Greenl. Ev., sec. 197. Clearly, in this case, the agent did not intend to admit the amount stated by the plaintiff to be the correct sum, as he placed his refusal expressly upon the ground that his counting the money would, in his opinion, render the defendant liable. Was it, then, the duty of the agent to count the money, and thus furnish to the plaintiff an admission by the defendant's agent of the contents of the package about to be delivered to the company for transportation to New York? The money was to be conveyed in a sealed package. The package was received sealed up, according to the testimony of the agent of the defendant. The company would only receive it when thus properly enveloped and secured. Declining to count the money or receive it before properly secured, the agent receipted for the package, and as the plaintiff well knew, with no other knowledge beyond his statement of the exact amount

inclosed. It was not the duty of the company as a common carrier to receive money for transportation unless the same was properly secured and addressed. How, then, can it be insisted, that before the package is in such condition that the company was bound as a carrier to receive it, the agent must inspect it while in the possession of the shipper? In our opinion, the company was under no obligation to furnish to the plaintiff evidence of the contents of a package received under such circumstances. The agent gave a receipt for the package, with its marks, and sealed and impressed it with the office marks peculiar to the office at Madison. The evidence given in the receipt is sufficient to enable the plaintiff to identify the package, and that is all that can be required of the carrier. A receipt for the article is sufficient, and the plaintiff must be able to establish the value, and cannot require the carrier to furnish such evidence for him. A different rule would require the company to become not only a carrier, but an appraiser of the value of all articles about to be intrusted to them for transportation.

The carrier, then, being under no obligation to count the money, no presumption can be created against him by his refusal to do so at the request of the plaintiff.

Did the receipt, then, create such a presumption against the defendant? The recital in the receipt, if it had absolutely admitted the sum claimed to have been contained in the envelope, would only have been *prima facie* evidence of the amount, and could have been contradicted by parol evidence: 1 Greenl. Ev., sec. 305. In the case under consideration, the evidence of the plaintiff, that the agent declared that they did not count money there, and that the amount was stated in the receipt from the declarations of the plaintiff alone, would have prevented any such presumption arising from the instrument.

But the language of the receipt is not *prima facie* evidence of the amount of money contained in the package. "Received of William A. Fitzgerald one package, sealed, and said to contain \$1,182.15," cannot be held to be an admission that the agent knew the contents of the package, for the statement that he received it "sealed" rebuts any implication of knowledge on his part of the contents, and the words "said to contain \$1,182.15," refer, therefore, clearly to the statement of the person who delivered the sealed package to the agent.

We regard the instructions given by the court as having

placed the plaintiff's case before the jury in the most favorable light, and we cannot disturb the finding of the jury, rendered as it was with the sealed envelope before them, with the impressions on the wax of the seal of the Madison office, and open only at the end, with the testimony of the plaintiff's witness that he had so opened it and taken out the contents.

We are not clear that the finding of the jury is not in accordance with the weight of the evidence; we are satisfied that it is not without evidence to support it.

The judgment is affirmed, with costs.

VERRY v. ROBINSON.

[35 INDIANA, 14.]

WIFE'S INCHOATE INTEREST IN HER HUSBAND'S LANDS IS NOT LOST BY MORTGAGE of such lands by him and foreclosure sale thereunder, where the wife was not a party to the mortgage; and the fact that the lands were afterwards sold on partition, to which the widow was not a party, would not divest her of her contingent interest.

PARTITION. The opinion states the facts.

J. W. Chapman, H. W. Harrington, and C. A. Korbly, for the appellants.

C. E. Walker and A. D. Matthews, for the appellee.

By Court, ELLIOTT, J. Euphemia Robinson filed a complaint in the court of common pleas of Jefferson County, alleging that she was seised in fee, as the widow of Thomas J. Robinson, deceased, of one third of five undivided ninths of a certain lot in the city of Madison, and that the defendants, Mary Jane Verry, the widow, and others, the children of John Verry, deceased, were seised of the residue of said lot, and praying partition, etc. The defendants answered in denial. The issue was submitted to the court for trial, who found the plaintiff entitled to one third of five ninths of the lot in fee as claimed in the complaint, and appointed commissioners to make partition thereof accordingly.

The commissioners having reported that the property could not be divided "without great injury thereto, and to the interest of the owners thereof," the court ordered and decreed that the same should be sold, and the proceeds divided among the proprietors, according to their respective interests, and appointed

Richard J. Bright a commissioner to sell the same on terms specified in the order.

The defendants having taken and filed the proper exceptions to the several findings and orders of the court, and having filed an appeal bond, which was approved by the court, thereupon appealed from the finding of the court, that the plaintiff was seised of one third of five ninths of said lot, and from the final order for the sale thereof based on said finding.

The finding and order of the court below are based on an agreement of the parties as to the facts of the case, which is made a part of the record, and is, in substance, as follows:—

That the plaintiff was married to Thomas J. Robinson in the year 1845, and lived with him, and was his wife up to the time of his death, in November, 1863; that prior to the year 1845, the father of Thomas J. Robinson died intestate, seised in fee-simple of lot No. 7, described in the complaint, leaving a wife and nine children, to whom the lot descended; the wife died before 1853; that prior to the year 1853, said Thomas J. Robinson purchased, and had conveyed to him in fee, the interests of four of the other children in said lot, and consequently then held five undivided ninths thereof; that in September, 1853, said Thomas J. mortgaged said five ninths of the lot to John Verry, the husband of the defendant Mary Jane Verry, and the father of the other defendants, to secure a debt; but that his wife, the plaintiff in this suit, did not join in said mortgage; that at the September term, 1856, of the Jefferson circuit court, John Verry obtained a decree of foreclosure on said mortgage against said Robinson, and for the sale of said five ninths of the lot for the payment of said debt; to which suit Euphemia, the plaintiff, was not a party; that a proper execution was subsequently issued on said decree, and the five ninths of said lot was sold and conveyed by the sheriff to said John Verry; that said John Verry subsequently instituted proper legal proceedings in the Jefferson circuit court against the other proprietors of said lot for partition, he claiming five ninths thereof; and such proceedings were had therein that the court appointed commissioners to make said partition, and to set off, in severalty, to said Verry five ninths of the lot, and one ninth to each of the other four proprietors; that the commissioners so appointed reported to the court that in their judgment the lot could not be so partitioned without great damage to the interests of said owners; and thereupon the court, on motion of said Verry, ordered that said lot be sold, as provided by the statute, and

that the proceeds be divided among the owners, in proportion to their respective interests, and appointed a commissioner to make said sale; that said commissioner, after having the lot duly appraised, sold the same at public auction to said John Verry for twelve hundred dollars, two thirds of the appraised value thereof; that said sale was reported to and confirmed by the court; that said Verry paid the purchase-money in full, but that before a deed was executed to him both he and the said commissioner died; that afterward, on the petition of the wife and heirs of said John Verry, defendants in this suit, the lot was conveyed to them under said purchase by a commissioner appointed by the court for that purpose; that in January, 1864, and before the commencement of this suit, the plaintiff requested said Mary Jane Verry and the other defendants to set off to her, or account to her for, her undivided interest in said lot; that the said Thomas J. Robinson and John Verry both died intestate, and that said proceedings in partition, and said sale and conveyance, all took place in the lifetime of said Thomas J. Robinson, but neither he nor the plaintiff in this suit was made a party thereto.

The agreement also extends to matters relating to the improvements on the lot, at the date of the mortgage to Verry, and those made by Verry after his purchase, but as no question is raised in this court involving those matters, a statement of them in this opinion is unnecessary.

It was also agreed that all matters of defense should be given in evidence under the general denial.

Under this state of facts it is insisted by the appellants that Euphemia Robinson, the plaintiff below, has no interest in or to any part of said lot, and that the finding of the court to the contrary, and the final order of sale, is therefore erroneous, and this presents the only question for the consideration of this court.

The statute of descents enacts that "if a husband die testate or intestate, leaving a widow, one third of his real estate shall descend to her, in fee-simple, free from all demands of creditors," etc.: 1 Gavin and Hord's Statutes, sec. 17, p. 294. Section 27 of the same act provides that "a surviving wife is entitled, except as in section 17 excepted, to one third of all the real estate of which her husband may have been seised in fee-simple, at any time during the marriage, and in the conveyance of which she may not have joined, in due form of law; and also of all lands in which her husband had an equi-

table interest at the time of his death." And the thirty-fifth section declares that "no act or conveyance, performed or executed by the husband without the assent of his wife, evidenced by her acknowledgment thereof, in the manner required by law, nor any sale, disposition, transfer, or encumbrance of the husband's property, by virtue of any decree, execution, or mortgage to which she shall not be a party, except as provided otherwise in this act, shall prejudice or extinguish the right of the wife to her third of his lands, or to her jointure, or preclude her from the recovery thereof, if otherwise entitled thereto."

In the case at bar, Thomas J. Robinson, the husband of Euphemia, the plaintiff, was seised in fee of the real estate in controversy during the coverture, and in 1853 mortgaged it to Verry, but his wife, Euphemia, did not, in any form, join in or become a party to the mortgage. The title of Thomas was sold on a foreclosure of the mortgage, and purchased in by Verry; but Euphemia was not a party to that suit, or in any manner affected by the decree or sale. Nor was she a party to the proceedings for partition prosecuted by Verry, and upon which the lot was sold and purchased in by him. Thomas J. Robinson, the husband, died in 1863, leaving the plaintiff, his wife, surviving him.

These facts would seem to bring the case within the provisions of the statute, and entitle the plaintiff to one third of the five ninths of the lot, of which her husband was seised during the marriage.

It is conceded by the appellants that the purchase by Verry of the interest of Thomas J. Robinson, at the sale under the mortgage, did not divest the contingent interest of Euphemia, his wife. But it is insisted that the subsequent sale of the lot, under the proceedings for partition, by destroying the co-tenancy, invested Verry, the purchaser, with an absolute fee in the entire lot, and divested the contingent interest of the plaintiff. The argument in support of the position is understood to be that the act of Robinson, in executing the mortgage, and the act of the law in the foreclosure and sale, made Verry a co-tenant with the other owners, and invested him with the same right that Robinson had, before Verry took his place, under the sale, and that as long as the tenancy in common existed, the contingent right of the plaintiff was not affected by the fact that the title of her husband had passed to Verry, but that the latter stood in the same relation to the

contingent right of the wife, that Robinson, the husband, would, if he had continued to hold the interest purchased by Verry. And hence it is further argued, that the sale under the proceedings for partition, instituted by Verry, as the representative of Robinson, had the same effect in divesting the contingent interest of the wife that it would have had if Robinson, the husband, had continued to hold the fee, and had instituted the proceedings in partition.

This position, we think, cannot be maintained. Verry, as the purchaser of Robinson's title under the mortgage, did not stand in the same relation, in all respects, to the contingent right of the wife that Robinson, the husband, did before the mortgage. Indeed, if the conclusion arrived at by the appellants' counsel as to the effect of Verry's purchase under the proceedings for partition is correct, the difference in their relations to the interest of the wife would be radical. Holding the title of Robinson, Verry instituted the proceedings for partition, under which he became the purchaser of the lot, and now claims that by virtue of that sale the contingent right of Mrs. Robinson became divested and lost. But if Robinson had continued to hold the title, and had instituted the proceedings for partition, and become the purchaser, it is clear that the interest of his wife in that event would have been increased instead of destroyed, as claimed by the appellants.

By the sale under the mortgage the title of the husband, which, prior to the mortgage, was directly united with the contingent right of the wife growing out of the marriage relation under the law, became severed from it. The title was no longer a unit. The estate of the husband, out of which sprang the claim of the wife, became divested and passed into the hands of a stranger, not an absolute and unencumbered fee, but subject to the contingent claim of the wife, depending, however, upon the then uncertain contingency that she should survive her husband. This suggests the argument which, to our minds, settles conclusively the question under discussion.

Robinson was seised of an unconditional and unencumbered fee in the five ninths of the lot. The contingent right of the wife is a mere incident under the law of that seisin of the husband, and though the entire title was in the husband, he could neither mortgage nor sell the interest of the wife, unless she voluntarily joined in the conveyance. But she did not join in the mortgage, and therefore both the mortgage and the subsequent purchase of Verry under it were subject to the con-

tingent right of Mrs. Robinson. In that purchase Verry did not pay for or acquire a title to that right. He did not own it, and his title was therefore subject to it.

In the suit for partition he represented the title or interest acquired by his purchase under the mortgage, and no more, and the sale of the lot, so far as Verry's interest was concerned, could not invest the purchaser with any better title, or greater interest in the property, than was held by Verry, and which he represented in that suit.

This position is not only sustained by the statute quoted in a previous part of this opinion, and by reason and necessity, but also accords with the letter of the statute under which the sale, in the proceedings for partition, was made.

The twenty-first section of the statute concerning the partition of lands, 2 Gavin and Hord's Statutes, 365, provides that "whenever it shall appear to the court that the purchase-money for the land sold has been duly paid, the court shall order such commissioner, or some other person, to execute conveyances to the purchaser, which shall bar all claims of such owners to said lands as effectually as if they themselves had executed the same."

We do not stop to discuss the question whether Verry, by his purchase under the partition, did more than to acquire the title of the other tenants in common, and whether, in contemplation of law, his title to the five ninths did not remain in him in the same condition that it would if he had acquired the title of his co tenants by private purchase from them; but we place the case on the broad ground that if the lot had been purchased at the sale under the proceedings for partition by a stranger to the record, it would not have divested the contingent right of the plaintiff in this suit. It is not intended to controvert the position assumed by counsel, that the rights of the wife in her husband's real estate are subject to legislative control while they remain inchoate. Nor do we discuss the question as to the effect of various statutory provisions authorizing the appropriation of lands for public use, as we do not think that the authorities referred to on that and kindred subjects throw any light on the question under discussion here.

We are referred to the case of *Weaver v. Gregg*, 6 Ohio St. 547 [67 Am. Dec. 355], which is claimed to be an authority in point in favor of the appellants. That was a petition for dower under the statute of Ohio. The husband of the plaintiff, during the coverture, was seised as tenant in common of

one undivided fourth part of certain lands. Proceedings for partition were instituted, but the lands were adjudged not to be susceptible of partition, and were sold by the sheriff, by order of the court, under the provisions of the statute, and the proceeds divided, during the lifetime of the husband. It was held that the sale of the lands under the proceedings for partition divested the inchoate contingent dower interest of the wife. Mr. Justice Brinkerhoff, in delivering the opinion of the court, says: "The right of dower in the wife subsists in virtue of the seisin of the husband; and this right is always subject to any encumbrance, infirmity, or incident which the law attaches to that seisin, either at the time of the marriage or at the time the husband became seised. A liability to be divested by a sale in partition is an incident which the law affixes to the seisin of all joint estates; and the inchoate right of the wife is subject to this incident. And when the law steps in and divests the husband of his seisin, and turns the realty into personalty, she is, by the act and policy of the law, remitted, in lieu of her inchoate right of dower in the realty, to her inchoate right to a distributive share of the personalty into which it has been transmuted."

We do not controvert the correctness of this decision. It is not in point in the case at bar, and therefore we decide nothing in reference to it. There the sale was under proceedings for partition during the seisin and life of the husband; his seisin was divested by the act of the law, and his entire interest in the land sold and converted into personalty and paid to him. But here the husband mortgaged his interest, subject to the inchoate contingent right of the wife, and Verry's purchase of that interest, under the mortgage, did not divest the contingent right of the wife; and hence, in the subsequent proceedings in partition, he did not represent any greater interest than that acquired by his purchase under the mortgage.

The principle involved in this case, we think, was settled by this court, in accordance with the opinion expressed here, in the case of *Rank v. Hanna*, 6 Ind. 20.

The judgment is affirmed, with costs.

INCHOATE RIGHT OF DOWER, NATURE AND EXTENT OF: See *Moore v. Mayor of N. Y.*, 59 Am. Dec. 473, and note 475; *Weaver v. Gregg*, 67 Id. 355; and as to the effect of a mortgage on such right, see the extended note to *Hitchcock v. Harrington*, 5 Id. 229, and *McCabe v. Bellows*, 66 Id. 467. In *Fletcher v. Holmes*, 32 Ind. 536, citing the principal case, the court say that the rights of a wife in the lands of her husband are recognized, in Indiana, "as a present inchoate right, like dower was, and protected like it."

DAY v. VALLETTE.

[25 INDIANA, 42.]

WHERE PURCHASER AT EXECUTION SALE FAILS TO PAY AMOUNT OF BID, and judgment is taken against him for the amount of the bid and damages, there is no equitable lien upon the land in favor of the execution plaintiff for the purchase-money.

EACH PARAGRAPH OF COMPLAINT MUST CONTAIN IN ITSELF SUFFICIENT AVERMENTS to constitute a good cause of action.

FORMER RECOVERY IS PRIMA FACIE CONCLUSIVE BAR TO LATER SUIT, where by the record of the former suit, filed with a plea of former recovery, it appeared that the issues joined in the former suit involved the questions presented in the later suit, but there were also other issues in the former suit which, if found for the same party, would have produced the same result; though the jury might decide such of the issues as were involved in the present case the other way.

MERE INDEX OF RECORD IS NOT COMPLIANCE WITH RULE OF COURT which requires the filing of an abstract of the record.

ACTION for certain moneys claimed to be due upon an execution sale. The opinion states the facts.

T. A. Hendricks and W. R. Harrison, for the appellants.

J. A. Beal, for the appellee.

By Court, **FRAZER, C. J.** Where upon the sale of lands upon execution the purchaser fails to pay the amount of his bid, and the execution plaintiff obtains judgment against such purchaser for the amount of his bid, and ten per cent damages, there is no equitable lien upon the land in favor of the execution plaintiff for the purchase-money, as in case of vendors. The execution plaintiff is not a vendor, nor a privy in estate or in law, and it is only in favor of such that the lien exists: *McKillip v. McKillip*, 8 Barb. 552.

The third paragraph of the complaint as amended in this case shows no case entitling the plaintiff below to any relief whatever, and the demurrer to it ought to have been sustained. Each paragraph must contain within itself sufficient averments to constitute a good cause of action. This not only fails to show that the plaintiff has any cause of action, but it utterly omits to connect him in any manner with the facts which it alleges, or to refer to anything which does so connect him. Our code is not liberal enough to warrant us in sustaining such a paragraph.

Error is assigned upon the action of the circuit court in sustaining a demurrer to the third paragraph of the answer, which set up a former judgment in the same matter. A copy of the record of the former suit is made part of the paragraph, from

which it appears that the issues in that case involved the question in this, and that there was a general finding and judgment against the plaintiff in this case. There were other issues, however, which, if determined for the same party, would have produced the same finding and judgment, though the jury might decide such of the issues as were involved in the present case the other way. It may be, therefore, that the former judgment is not necessarily a conclusive bar to this suit; but this need not be now decided. Is it such *prima facie*? We think so: *Agate v. Richards*, 5 Bosw. 456. The demurrer ought therefore to have been overruled.

It was not error to strike out the fourth paragraph of the answer on motion, it being substantially the same as the third.

There are a large number of other questions urged by counsel, but inasmuch as the appellant does not present them as the practice requires, they are not considered. A mere index to the transcript is not a compliance with the tenth rule of this court.

The judgment is reversed, with costs, and the cause remanded, with directions to the court below to set aside so much of its proceedings as are inconsistent with this opinion.

EACH COUNT IN PLEADING SHOULD BE COMPLETE IN ITSELF, and state a cause of action: *Tinsman v. Bekoldere R. R. Co.*, 64 Am. Dec. 415. This is the settled law in Indiana and other states: *Clarke v. Featherston*, 32 Ind. 144; *Potter v. Earnest*, 45 Id. 418; *Pennsylvania Co. v. Holderman*, 60 Id. 26; *Clark v. Whitaker I. Co.*, 9 Mo. App. 448, all citing the principal case.

ON PLEA OF FORMER RECOVERY, EVIDENCE IS ADMISSIBLE to show that the issues presented in the later suit were not tried in the former cause: *Dessar v. Rich*, 1 Wils. (Ind.) 374; but no evidence is admissible to prove that what appears, on the record in the former suit, to have been determined, was not in fact so determined: *Landers v. George*, 49 Ind. 321; both citing the principal case.

BENNETT v. WELCH.

[26 INDIANA, 140.]

LACHES IS GROUND FOR DENIAL OF SPECIFIC PERFORMANCE where twenty-three years have elapsed from the date of a contract for the purchase of real estate, during thirteen years of which no payments were made by the purchaser. But there is no laches where, in such a case, the vendor has preserved the vigor of the contract for his own benefit by the pendency of an action to enforce a lien for the purchase-money, and the vendee, answering to that action, offers to perform, and asks specific performance against the vendor; for the latter, by his own act, has thereby continuously recognized the obligation of the contract.

BILL in equity. The opinion states the facts.

R. C. Gregory and H. Jones, Jr., for the appellants.

Z. Baird, J. A. Stein, and J. J. Jones, for the appellee.

By Court, FRAZER, C. J. In 1844, Welch filed his bill in chancery against the appellees, then infants, who were the heirs at law of William Bennett, deceased, also against the widow and administrator of Bennett, for the purpose of subjecting to sale certain lands in Tippecanoe and Fountain counties, alleged to have been sold by him to Bennett in his lifetime, in 1838, to satisfy the unpaid purchase-money claimed to be due him. He obtained a decree under which, in 1845, the lands in Tippecanoe County were sold to him for four thousand dollars,—not sufficient to satisfy the decree,—and having obtained a deed under his purchase, he went into possession of the lands in both counties. In 1846, he filed a claim against Bennett's estate for the balance of his decree, which was allowed, and in 1848, he received from the administrator upon that claim \$313.09. In 1856, the present appellants and the other defendants in the chancery cause removed it to this court by writ of error, and after it had remained here five years the decree was, in 1861, reversed, and the cause remanded. The appellants then filed a counterclaim, averring that their ancestor had paid a larger part of the purchase-money than was alleged in the bill; that Welch had been in possession of the lands since 1845, and asking that the rents and profits since that date be charged to Welch, in satisfaction of so much of the purchase-money, claiming that the whole would thus be satisfied, but offering to pay any sum that might be found due him when ascertained, and praying that thereupon he be compelled to convey in specific performance of his contract with their ancestor. Welch subsequently amended his original complaint, and afterward demurred to the counterclaim, and then, at a later date, 1862, dismissed his complaint. The counterclaim was variously amended. A demurrer to it was overruled; an answer was then filed, a reply to the answer, and a demurrer to the reply, which was by the court overruled to the reply, but sustained to the counterclaim, and final judgment thereon rendered for Welch.

The only question before us arises upon the action of the court below upon the demurrer, and that question is, Was the counterclaim sufficient? It seems very plain to us that the allegations of the answer to the counterclaim must be

excluded from consideration in the decision of this question. Whether the pleading to which the demurrer was carried back and sustained was good must be determined upon its own averments, in connection with those of the original complaint, and can in no measure depend upon any subsequent pleading. This observation is called for by the fact that the question is argued on behalf of the appellee, and seems, from an opinion of the judge below, appended to the appellee's brief, to have been decided as if the averments of the subsequent pleading were to be deemed a part of the counterclaim in considering the question.

Time was not of the essence of the contract. This is conceded and need not therefore be illustrated. The contract was one which, *prima facie*, would properly justify the exercise of the power of a court of equity in compelling its specific performance. This, too, is not questioned. But it is insisted that the laches of the appellants preclude the exercise of this power in their behalf in this case. Twenty-three years had elapsed, during which a large part of the purchase-money had remained unpaid, and during the last thirteen years of that time no payments whatever had been made by the appellants or the administrator of their ancestor. It is scarcely to be controverted that such delay would be *prima facie* sufficient to prevent a court of equity from interposing to give relief by a decree for specific performance, in favor of parties thus in default.

But here the appellee as late as 1848 received money upon the contract. His appearance in this court as late as 1861, resisting a reversal of his decree, was an affirmance of the contract. His prosecution of that case in the court below after its reversal here until about one year after the counterclaim was filed was an effort on his part to enforce the contract. His action sought its specific performance as certainly as did the counterclaim. Both parties concurred, then, in desiring and seeking its performance, and treating it as obligatory in equity, until the moment when the appellee dismissed his suit, in 1862. Until that event the controversy between the parties was not whether the contract should be held obligatory, for each sought to compel the other to perform it, and thereby recognized its binding force against himself. But the amount due the appellee was contested by the appellants, and they sought to charge him with the rents and profits during the time he was in possession under his purchase by virtue of the decree, which he resisted.

Where the mere lapse of time has been held to bar an application for specific performance, it has usually been on the ground that an abandonment of the contract could be inferred, or a purpose to speculate on the defendant by delay. And there can be no doubt that the delay in the case before us was abundantly sufficient to have justified the appellee in regarding the purchase as having been abandoned. But by seeking to enforce it he preserved its vigor for his own benefit, and it would not be creditable to our jurisprudence if he could be sustained in saying that he shall nevertheless be discharged from its performance by his own mere volition. While seeking to compel a specific performance, and continuing thereby to admit an obligation to perform on his part, his acts were certainly inconsistent with an intention to object to doing so on account of the lapse of time, and this must be deemed a waiver of that objection. Thus the doctrine is stated by Mr. Fry in his treatise on specific performance, sec. 745, on the authority of *King v. Wilson*, 6 Beav. 124. The same rule is recognized in *Rector v. Price*, 1 Mo. 380, and, indeed, seems to be not only fairly deducible from the authorities, but eminently just and reasonable. That a party who brings his suit to compel his adversary to perform, when the adversary takes him at his word, and in court offers to perform whatever can be required, and asks that the plaintiff may be held also to perform, may thereupon refuse, ought never to be heard of in a court of justice. It would be simple trifling, and it seems to us ought not to be tolerated.

The case of *Green v. Russell*, 5 Hill, 183, cited on behalf of the appellee, does not appear to us to be inconsistent with the views already expressed. That case was trover for a span of horses. The defense was, that the horses were the defendant's, having been obtained from him by a contract of purchase which was void for fraud. The plaintiff having shown that the defendant had at one time sued for the purchase-money of the horses before it was due under the contract, his suit, however, resulting in nothing, on account of defects in the proceedings, insisted that the defendant was estopped from questioning the validity of the contract. It was held that the suit did not estop the defendant from showing that the contract was void for fraud. This was undoubtedly correct, for the sufficient reason, if no other had existed, that the previous suit was itself in disaffirmance of the contract, and not, as in the case before us, to enforce it. The view we have expressed

in this case does not rest upon the ground of estoppel, and in no respect involves the doctrine upon that subject. We merely hold the appellant bound in equity because he had, by his own acts, continuously recognized that obligation, and sought to enforce the correlative obligation of the other party.

The judgment is reversed, with costs, and the cause remanded, with directions to the court below to set aside its action on the demurrer and its subsequent proceedings, and proceed according to this opinion.

GREGORY, J., having been of counsel, did not sit in this case.

LACHES IN SEEKING RELIEF BARS RIGHT TO SPECIFIC PERFORMANCE, WHEN: See the note to *Smith v. Thompson*, 54 Am. Dec. 132 et seq.; and see *De Cordova v. Smith*, 58 Id. 136. The principal case is cited in *Hamilton v. Plant*, 81 Ind. 426, to the point stated in the *sylabus*.

LOUISVILLE AND NEW ALBANY RAILROAD COMPANY v. STATE EX REL. McCARTY.

[26 INDIANA, 177.]

ROLLING STOCK OF RAILROAD IS SO CONNECTED WITH PURPOSES AND USES OF TRACK AND SUPERSTRUCTURE THAT IT IS WITHIN THE POWER OF THE LEGISLATURE TO TREAT IT AS REAL PROPERTY, FOR THE PURPOSES OF TAXATION.

INDIANA CONSTITUTION DOES NOT REQUIRE UNIFORM METHOD OF VALUATION OF PROPERTY FOR TAXATION, but only "such regulations as shall secure a just valuation"; and in determining how this end shall be secured, the legislature must exercise a discretion, and unless the method adopted be clearly inadequate to secure the result, the courts cannot interfere.

STATUTE PROVIDING THAT APPRAISERS, IN ESTIMATING VALUE OF ROAD FOR PURPOSE OF TAXATION, shall take into consideration the location of the road for business, the competition of other roads, its earnings, etc., is constitutional.

MANDAMUS WILL NOT LIE WHERE STATUTE HAS EXPRESSLY PROVIDED ANOTHER ADEQUATE REMEDY.

TIME FOR MAKING RETURN OF TAXABLE PROPERTY IN INDIANA stated.

ACTION against railroad company for failure to file its statement of property for taxation. The opinion states the facts.

T. L. Smith and M. C. Kerr, for the appellant.

D. E. Williamson, attorney-general, and *H. Crawford*, for the state.

By Court, RAY, J. The auditor of state filed, in the court of common pleas of Floyd County, an affidavit charging that the appellant did not, between the first day of January, 1864, and the first day of June next ensuing, file with the auditor of Floyd County, where the principal office of the company was situated, a statement of the amount of its capital stock for taxation, and praying for a *mandamus* requiring it to do so. A motion was made upon this affidavit for a *mandamus*, and upon the overruling of a demurrer, an alternative writ was issued. A return was made to the writ, and upon motion, the return was rejected, and a peremptory *mandamus* was issued. The questions presented by these rulings of the court were properly reserved, and are now before us for our consideration. The first question we will examine is, whether the appellant was in default in not having made a statement to the auditor of Floyd County of the amount of its capital stock for taxation.

An act of the legislature was approved March 4, 1859, entitled "An act to amend the sixth, eighth, ninth, and fourteenth sections of an act entitled 'An act to provide for the appraisement of real estate, and prescribing the duties of officers in relation thereto,' approved December 21, 1858, also defining the duties of appraisers and deputy appraisers and the auditor of state."

If this was the only law in force in regard to the appraisement and taxation of the property of railroad companies, then no such statement was required to be furnished. The appellant insists that this was and is the only law in force on this subject.

The appellee denies that the amendment of 1859 to the act of 1858 is valid, and insists that the "Act to provide for the valuation and appraisement of real property," etc., approved June 21, 1852, with the amendments to that act approved December 21, 1858, is the only law in force providing for the appraisement and taxation of the property of railroad companies.

The first objection presented to the amendatory act of 1859 is, that the title embraces as the subject to be appraised real estate alone, and that the act, after providing for a "valuation of all lands, town lots, depot grounds, and buildings and improvements thereon, other than road-beds, switches, and side-tracks, and railroad tracks and superstructures thereon, used or held by railroad companies, according to the

same rule prescribed for ascertaining the value of other real property," proceeds to direct that the appraisers shall "then appraise the value of said road per mile, through their respective counties, including in that valuation the value of all the rolling machinery aforesaid, depots, depot grounds, and machine-shops." This rolling machinery, it is insisted, is personal property, and not coming within the subject-matter stated in the title, as required by section 19, article 4, of the constitution of this state, must be stricken from the act, and then the act, failing to provide for the valuation for taxation of such personal property, would not comply with section 1, article 10, of the constitution, requiring that, "the general assembly shall provide by law for a uniform and equal rate of assessment and taxation; and shall prescribe such regulations as shall secure a just valuation for taxation of all property, both real and personal, excepting such only for municipal, educational, literary, scientific, religious, or charitable purposes as may be specially exempted by law." This objection is not well taken. The rolling machinery is intimately connected with the purposes and uses of the railroad track and superstructure, and the power of the legislature to treat it as realty for the purposes of taxation cannot be seriously questioned. It is so treated in this act, and is therefore embraced in the title.

The act further provides that, in making the estimate of the value of the road, "the appraisers shall take into consideration, in addition to the rule prescribed for the valuation of real estate, the location of such road for business, the competition of other roads, its earnings above current expenses and repairs, its condition for present and future business, so as to enable them to arrive at the actual present value of such road, independent of what it cost or the amount of its indebtedness." It is objected that this requires a special method of appraising the real estate of railroad companies, and contravenes the provision of the constitution last cited. But the constitution does not require a uniform method of valuation of property, but only "such regulations as shall secure a just valuation for taxation of all property, both real and personal." The legislature must use a discretion as to the best method of securing a just valuation of property, and unless the method adopted be clearly inadequate to secure that result, we cannot question its action. The elements that make up the value of a railroad are not identical with those that give value to other

property, and it is certainly proper to take into account in estimating such value every consideration enumerated in the statute. Indeed, it seems to us that the direction was hardly required, as an intelligent appraiser would naturally give weight to all these things in making an estimate of the value of the railroad.

The appellee also urges that the act does not provide for the appraisement and taxation of the personal property of railroad companies, and therefore fails to comply with the constitutional requirement that all real and personal property should be taxed, except as therein mentioned.

The act, however, does not profess to include personal property. It is but an amendment of certain sections of the act of 1858, *supra*, and that act only related to the appraisement of real estate, and only repeals "so much of sections 32, 33, 34, and 35 of 'An act to provide for the valuation and assessment of the real and personal property, and the collection of taxes in the state of Indiana; for the election of township assessors, and prescribing the duties of assessors, appraisers of real property, county treasurers, and auditors, and the treasurer and auditor of state,' approved June 21, 1852,—as are inconsistent with the provisions of this act."

The act of 1858, then, only repeals so much of the act of 1852 as relates to the appraisement of real estate, including rolling stock of railroads, and leaves in full force all the requirements of that law in regard to the furnishing to the auditor of the proper county a list of all the stock in said company, and its value. The stock includes all the personal property of a railroad company: *State v. Hamilton*, 5 Ind. 310. The law of 1859, and so much of the law of 1852 as did not conflict with its provisions, therefore remained in force, and provided for the listing and appraisement of all the property, real and personal, of railroad companies, and is therefore not objectionable in failing to comply with the requirements of the constitution. It was, then, the duty of the appellant, in obedience to the law of 1852, *supra*, to have furnished to the auditor of Floyd County, between the first day of January and the first day of June, a list of all personal property of said company, except its rolling machinery, and its value. This, the affidavit avers, the appellant failed to do. It then became the duty of the auditor, upon such failure, to proceed to make such list, as required by section 37 of the act of 1852, *supra*, and the railroad company had no longer a right, and

could not be required, to make such statement: *State v. Hamilton*, 5 Ind. 310. If it were not provided by statute that, upon failure of the railroad company to file such statement within the time required by law, the auditor of the county shall proceed to make the same, a *mandamus* would doubtless lie to compel the officers of the railroad to furnish the list after the time had expired; but the rule is well established that *mandamus* will not lie where the statute has expressly provided another adequate remedy. Upon the failure of the appellant to comply with the law, it became the duty of the auditor of the proper county to prepare the statement, and the auditor of state could look only to him. This is in accordance with the ruling of the court in the case we have cited, and we are not disposed to question its correctness.

For the reason stated, the court should have overruled the motion to reject the return of the appellant to the alternative writ.

The judgment is reversed, and the cause remanded for further proceedings in accordance with this opinion.

WHERE CONSTITUTION REQUIRES ONLY "JUST" VALUATION FOR TAXATION OF PROPERTY, the taxing power is to use its discretion in determining what is a "just" valuation: *Whitney v. Ragsdale*, 33 Ind. 110; *Wisconsin O. R. Co. v. Taylor Co.*, 52 Wis. 79, both citing the principal case.

MANDAMUS DOES NOT LIE WHERE THERE IS ANOTHER ADEQUATE REMEDY: See *Fremont v. Crippen*, 70 Am. Dec. 711, and note, and see the principal case cited to this effect in *Indianapolis & O. R. R. Co. v. Lawrenceburg*, 37 Ind. 495; *Boone Co. v. Riley*, 33 Id. 196; *Gardner v. Haney*, 86 Ind. 26.

LINCK v. KELLEY.

[25 INDIANA, 275.]

WORDS "I HAVE F—KED REBECCA KELLEY ONE HUNDRED TIMES" are actionable *per se*, the word "f—ked" having a recognised meaning, but the words "I have screwed Beck Kelley one hundred times" are not actionable, unless the word "screwed" is aided by other averments.

IN ACTION FOR SLANDER, IF COMPLAINT FAILED TO SHOW that the sexual intercourse implied by the words charged as slanderous was illicit, the defect would be cured by answer admitting the speaking of the words, and alleging that he had so had illicit intercourse with the plaintiff, and that she had consented thereto.

SLANDER. The opinion states the facts.

H. L. Morrison, L. McClurg, and J. N. Sims, for the appellant.

R. P. Davidson, for the appellee.

By Court, GREGORY, J. Rebecca Kelley sued the appellant in the court below for slander. The words charged are, "I have f—ked Rebecca Kelley one hundred times." "I have screwed Beck Kelley one hundred times."

The defendant answered that "he did speak the words charged in the complaint, but that he only spoke them to a friend in confidence, without any intention of giving the same publicity, or otherwise injuring the plaintiff, but that in fact the words were true at the time he uttered them. That he had many times, prior to the speaking of the words, had illicit sexual intercourse with the plaintiff, to all of which she at the time consented." The plaintiff replied by the general denial. Trial by jury; verdict for the plaintiff. The defendant moved in arrest of judgment, on the grounds: 1. That the plaintiff's complaint did not disclose a right of action; 2. That the plaintiff's complaint did not allege facts sufficient to entitle her to a judgment. The court below overruled the motion and rendered judgment on the verdict, and this is assigned for error. It is claimed that the words charged do not import whoredom, and are not actionable *per se*. We think otherwise. The word "f—ked," although not to be found in any vocabulary of the English language, is as well understood as any other English word: *Edgar v. McCutchen*, 9 Mo. 758. A number of common English words are not to be found in the standard lexicons of the language on account of their vulgarity. It may be that the word "screwed" is not actionable in the absence of other averments, but if one set of the words charged are actionable *per se*, the motion in arrest was rightly overruled.

It is urged that the words spoken do not import that the intercourse between the plaintiff and defendant, implied therein, was unlawful. If this was so, the answer cures the defect. The facts averred in the complaint, however, show *prima facie* that the relation of husband and wife did not exist between the plaintiff and the defendant, and sexual intercourse between persons sustaining any other relation is unlawful, and an act of whoredom. The circuit court committed no error in overruling the motion in arrest of judgment.

The judgment is affirmed, with costs, and ten per cent damages.

McKNIGHT v. KNISELY.

[25 INDIANA, 336.]

APPEAL WILL LIE TO SUPREME COURT FROM INTERLOCUTORY ORDER directing the payment of money into court, in a proceeding supplementary to execution.

WHERE COMMERCIAL PAPER IS RECEIVED IN PAYMENT AND EXTINGUISHMENT OF PRE-EXISTING DEBT, the holder is entitled to protection.

ORDER OF COURT DIRECTING ASSIGNEES OF NOTE, RECEIVED IN PAYMENT OF PRE-EXISTING DEBT, to be made parties to a proceeding supplementary to execution which had been commenced after such assignment, for the purpose of trying the question whether they were holders of the paper in good faith, and also directing the payment into court of the money due upon the notes, is not authorized by the Indiana statute.

PROCEEDING supplementary to execution. The opinion states the facts.

R. and H. Crawford, for the appellants.

T. L. Smith and M. C. Kerr, for the appellees.

By Court, GREGORY, J. This is a proceeding by Knisely, Stout, and Kellogg, judgment creditors of Richie, against Richie, Akin, McKnight, Webber, and Crawford, under the statute regulating "proceedings supplementary to execution": 2 Gavin and Hord's Statutes, 260 et seq. The complaint averred that Akin had certain choses in action in his possession which belonged to Richie; that the appellants, McKnight and Webber, were indebted to Richie in the sum of twelve hundred dollars, on account of certain notes executed by them to him. The defendants answered under oath, and Richie and Akin answered interrogatories put to them by the plaintiffs.

The cause was submitted to the court for trial; the evidence was heard; the court found the amounts due the plaintiffs from Richie on the judgment set forth in the complaint, appointed a receiver, and ordered Akin to deliver to the receiver the choses in action in his hands belonging to Richie, and ordered McKnight and Webber to pay into court the money due from them on their notes to Richie; and ordered the members of certain firms, as soon as their names could be ascertained by the plaintiffs, to be made parties to the proceedings to answer as to whether they were the holders of the notes of McKnight and Webber in good faith. The cause was continued. McKnight and Webber appeal to this court from the order requiring them to pay the money due from them into court.

The evidence is in the record. The notes of the appellants to Richie were payable at a chartered bank in this state, and

are by statute commercial paper, governed by the law merchant. Before the commencement of these proceedings the notes had been assigned to different firms in payment of pre-existing debts due from Richie to them. A motion is made by the appellees to dismiss the appeal, on the ground that there is no judgment, final or interlocutory, from which an appeal can, under the statute, be taken.

The statute provides that "appeals to the supreme court may be taken from an interlocutory order of any court of common pleas or circuit court, or judge thereof, in the following cases: 1. For the payment of money; to compel the execution of any instrument of writing, or the delivery or assignment of any securities, evidences of debt, documents, or things in action": 2 Gavin and Hord's Statutes, p. 277, sec. 576. It is contended that the words "for the payment of money," mean the payment from one party to a suit to another; that they do not embrace orders for the payment of money into court. This is not a fair construction of the clause under consideration. This is a remedial statute, and must be liberally construed. The evils intended to be remedied were, that the defendants were often compelled to part with their money under erroneous interlocutory orders of the common pleas and circuit courts, and were subjected to the inconvenience of having it tied up to await the slow process of a long litigation, without the right of appeal until after final judgment. An order to compel a defendant to pay a plaintiff money can rarely be said to be interlocutory. In the very nature of things, an interlocutory order for the payment of money, in most cases, is such an order as will place the money in a condition to abide the final judgment of the court. We think that an appeal will lie in this case. The court below had no power, under the statute, to order the holders of commercial paper, assigned to them by the judgment debtor for a pre-existing debt, before the commencement of the proceedings, to be made parties. The only provision of the statute as to parties in a case like the one in judgment is this, that "after the issuing or return of a judgment against the property of the judgment debtor, or any one of the several debtors in the same judgment, and upon an affidavit that any person or corporation has property of such judgment debtor, or is indebted to him in any amount, which, together with other property claimed by him as exempt from execution, shall exceed the amount of property so exempt by law, such person, corporation, or any member thereof may be

required to appear and answer concerning the same as above provided": 2 Gavin and Hord's Statutes, pp. 261, 262, sec. 522. There was no conflict in the evidence as to the facts, viz., that the notes in question were commercial paper, and that they had been assigned before the commencement of these proceedings for a pre-existing debt due from Richie to the persons to whom the assignments were made. McKnight does swear that he was called on for the payment of these notes by Crawford, the attorney of Richie, after the dismissal of a prior proceeding. But it is not shown that Crawford held them as the attorney of Richie. There was nothing in his relation to Richie which would have prevented him from acting as the attorney of the holders of this paper. This demand of payment, moreover, was before the commencement of these proceedings. Says Mr. Parsons: "It is now quite well settled, that in the first of the three cases before stated, namely, where negotiable paper is received in payment and extinguishment of a pre-existing debt, the holder is entitled to protection": 1 Parsons on Notes and Bills, 221. The learned author has in a note (b) collected the authorities on this point. But this is not an open question in this state: *Vallette v. Mason*, 1 Ind. 288; *Westbrook v. Robinson*, 5 Blackf. 105.

As the statute does not authorize the making of the holders of the paper parties to the action, it would follow that they could at any time demand payment of McKnight and Webber, and that the latter could not protect themselves by the order of the court in a case in which the former were not parties and could not be made parties. There is nothing in the pleadings or proofs tending to show that the assignments of these notes were fraudulent.

The judgment of the court below ordering the payment of the money due from McKnight and Webber on their notes into court is reversed, with costs, and the cause remanded to said court for further proceedings in accordance with this opinion.

RIGHTS OF HOLDER TAKING NOTE FOR PRE-EXISTING DEBT: *Emanuel v. White*, 89 Am. Dec. 385; or as collateral security: *Lee v. Smead*, 71 Id. 494, and notes. In Indiana it is held that if taken in discharge of a pre-existing debt, the holder of the note is entitled to protection, and may enforce it: *Spurys v. McPheeters*, 42 Ind. 529; *Straughan v. Fairchild*, 80 Id. 600, citing the principal case.

APPEAL LIES FROM INTERLOCUTORY ORDER directing payment of money into court in a proceeding supplementary to execution: *Cook v. Officers' Nat. Bank*, 73 Ind. 260, citing the principal case.

BANSEMER v. TOLEDO AND WABASH RAILWAY CO.

[25 INDIANA, 484.]

RAILROAD COMPANIES ARE COMMON CARRIERS, AND ARE LIABLE AS SUCH by the rules of the common law for losses occurring from any accident which may befall the goods during the transit, except such as result from the act of God or the public enemy.

COMMON CARRIERS BY WAGONS ARE REQUIRED TO DELIVER GOODS TO CONSIGNEE at his house or place of business, and their liability as such continues until such delivery; but this rule does not apply to common carriers by vessels on the seas, lakes, or navigable rivers, or by railroads.

WAREHOUSE OR DEPOT AT TOWN OR STATION TO WHICH GOODS ARE SHIPPED BY RAILROAD is the proper place of delivery to the consignee, and when they are so discharged from the cars, and in the absence of the consignee are safely stored in the company's warehouse, the liability of the railroad company as a common carrier is terminated, without notice to consignee of the arrival of the goods.

RAILROAD COMPANY IS LIABLE AS WAREHOUSEMAN FOR GOODS STORED at the place to which they were consigned and have been brought, and as such it is required to keep the goods in store for the consignee for a reasonable time, without additional reward.

ACTION against railroad company for value of certain goods. The opinion states the facts.

J. H. Brown and A. A. Price, for the appellants.

By Court, **ELLIOTT, J.** The appellants, who were the plaintiffs below, sued the railway company to recover the value of four cases of boots and shoes, received by the defendants at the company's depot at Lafayette, to be carried to Marshfield, in Warren County, and there delivered to Isaac N. Julian, one of the plaintiffs, to whom they were consigned.

The complaint alleges that the freight train on which the goods were shipped was due at Marshfield at six o'clock P. M. of the 29th of November, 1864, at which time the consignee, who resided in Marshfield, and near the defendant's station and depot at that place, was at said depot ready to receive said goods, but that for some cause said freight train did not arrive at that place until after nine o'clock of the same evening; that upon the arrival of the train the goods were unloaded from the car, and deposited in the warehouse and depot of the defendant at Marshfield; that during the same night, and before any notice of their arrival had been given to the consignee, said warehouse and goods were destroyed by fire. The complaint seeks to charge the defendant only as a common carrier, and not as a warehouse keeper. The court sustained a demurrer to the complaint, because it did not

state facts sufficient to constitute a cause of action. The plaintiffs excepted, and the court gave final judgment against them for costs.

The only question presented in the case is, Is the defendant liable as a common carrier for the value of the goods thus destroyed before notice to the consignee of their arrival?

Railroad companies are common carriers, and as such are liable by the rules of the common law for losses occurring from any accident which may befall the goods during the transit from any cause, except such as arise from the act of God or the public enemy. In the present case it is evident that the loss did not result from any cause within the exception. Nor is it shown by the complaint that it was from any default or negligence of the company, its agents, or servants.

If at the time of the loss the relation of the defendant in respect to the goods was that of a common carrier, then the defendant is liable in this suit, because, as a common carrier, the company is bound as an insurer to take the risk, and no question of default or negligence can arise in the case. Though the loss may have resulted from a cause for which neither the defendant nor its servants were in any degree chargeable, still, as a common carrier, the company is liable and must bear the loss. This stringent rule of the common law is founded in necessity, arising from the nature of the employment, as a protection against frauds of which it would seldom be possible to adduce proper legal evidence. But on the other hand, if when the goods arrived at Marshfield, and were unloaded from the cars and deposited in the defendant's warehouse for delivery to the consignee, the transit was at an end, and the defendant's liability as a common carrier terminated, and the company continued thereafter to have possession of the goods, not as a common carrier, but in the capacity of a warehouseman, and was only responsible for the care and diligence attached by law to that relation, which does not extend to a loss by fire not caused by the default of the warehouseman or that of his servants, the company is not liable.

As a general rule, common carriers by wagons are required to deliver the goods to the consignee at his house or place of business, and their liability as such continues until such delivery is made; but this rule is not applicable to common carriers by vessels on the seas, lakes, or navigable rivers, nor to common carriers by railroads. Vessels are necessarily com-

fined to the water, and discharge their cargoes on the wharves at public landings, and in such case general custom, arising from necessity and the convenience of commerce, sanctions such discharge as the proper place of delivery. If the consignee is not present to receive the goods, the carrier may discharge himself from further liability by notifying the consignee of their arrival, and allowing reasonable time for him to prepare to take them away, or if the consignee cannot be found, by having them stored in a proper warehouse for him. Cars on a railroad are necessarily confined to the track of the road, and unless the consignee should have a warehouse immediately by the track, an actual delivery cannot be made without a change in the means of transit. From the very nature of this mode of carriage, the convenience of the company, if not an absolute necessity, demands that depots or warehouses should be erected at places where goods are received and discharged, in which they may be safely stored, and that there should also be agents at such places for the transaction of the necessary business. These warehouses constitute the proper places of delivery. The consignee must be presumed to know that the goods are there discharged, and that it is his duty to receive them at that place. When the goods have reached their destination the transit is at an end, and we think that when they are discharged from the cars, and in the absence of the consignee or his agent to receive them, are safely stored in the warehouse, the liability of the company as a common carrier is then terminated, without notice to the consignee of their arrival. When the goods are thus safely stored, the character of a warehouseman attaches to the company, and as such it is required to keep the goods in store for the consignee for a reasonable time for him to receive and take them away, without additional reward. But, during such time, the railroad company is only liable as a warehouseman for the want of that degree of care and diligence incident to that relation.

This is but a reasonable and just rule as applicable to this particular mode of carriage, and to the relation established thereby between the railroad company and the shipper, and the manner in which the business is necessarily conducted. It is also supported by authority. In *Norway Plains Co. v. Boston and Maine R. R. Co.*, 1 Gray, 263 [61 Am. Dec. 423], the consignee had notice of the arrival of the goods, but the question is very fully and ably discussed by Chief Justice Shaw. It is there said: "The nature of the transportation,

though on land, is much more like that by sea, in this respect, that from the very nature of the case the merchandise can only be transported along one line and delivered at its termination, or at some fixed place by its side, at some intermediate point. The rule in regard to ships is very exactly stated in the opinion of Buller, J., in *Hyde v. Trent and Mersey Navigation Co.*, 5 Term Rep. 397, thus: 'A ship trading from one port to another has not the means of carrying the goods on land; and, according to the established course of trade, a delivery on the usual wharf is such a delivery as will discharge the carrier.' Another peculiarity of transportation by railroad is, that the car cannot leave the track or line of rails on which it moves. . . . From this necessary condition of the business, and from the practice of these transportation companies to have platforms on which to place the goods from the cars, in the first instance, and warehouse accommodation by which they may be securely stored, the goods of each consignment by themselves, in accessible places, ready to be delivered, the court are of opinion that the duty assumed by the railroad corporation is,—and this being known to the owners of the goods forwarded, must, in the absence of proof to the contrary, be presumed to be assented to by them,—that they will carry the goods safely to the place of destination and there discharge them on the platform, and then and there deliver them to the consignee or person entitled to receive them, if he is there ready to take them forthwith, or if the consignee is not there ready to take them, then to place them securely and to keep them safely for a reasonable time, ready to be delivered when called for. This, it appears to us, is the spirit and legal effect of the duty of the carrier and of the contract between the parties when not altered or modified by special agreement. . . . From this view of the duty and implied contract of carriers by railroad, we think there result two distinct liabilities: first, that of common carriers, and afterward, that of keepers for hire, or warehouse keepers, the obligations of each of which are regulated by law. . . . This view of the law applicable to railroads as common carriers of merchandise affords a plain, precise, and practical rule of duty of easy application, well adapted to the security of all persons interested. It determines that they are responsible as common carriers until the goods are removed from the cars and placed on the platform; that if, on account of their arrival in the night, or at any other time when, by the usage and course

of business, the doors of the merchandise depot or warehouse are closed, or for any other cause they cannot then be delivered, or if, for any reason, the consignee is not there ready to receive them, it is the duty of the company to store and preserve them safely under the charge of competent and careful servants, ready to be delivered, and actually to deliver them when called for by the party authorized and entitled to receive them; and for the performance of these duties, after the goods are delivered from the cars, the company is liable as a warehouseman or a keeper of goods for hire."

To the same effect are the cases of *Thomas v. Boston and Providence R. R. Co.*, 10 Met. 472 [43 Am. Dec. 444], and *Denny v. New York Central R. R. Co.*, 13 Gray, 481 [74 Am. Dec. 645]. In *Richards v. Michigan Southern etc. R. R. Co.*, 20 Ill. 404, it was held that to terminate the liability as a common carrier it is not necessary that the railroad company should give notice of the arrival of the goods to the owner or consignee, and that so soon as the goods arrive at their destination, or at the terminus of the road, and are unloaded and placed safely and securely in the railroad company's warehouse, the responsibility of the common carrier ceases, and that of the warehouseman attaches. The same ruling was made in *Porter v. Chicago and Rock Island R. R. Co.*, 20 Id. 407 [71 Am. Dec. 286]. In *New Albany and Salem R. R. Co. v. Campbell*, 12 Ind. 55, the question was discussed, but not decided, for the reason that the consignee had notice of the arrival of the goods, and had paid the freight on them before they were destroyed. A contrary doctrine was held in the case of *Moses v. Boston and Maine R. R. Co.*, 32 N. H. 523 [64 Am. Dec. 381], and we are referred by the appellant to numerous other cases, but on an examination of them we find them all against common carriers by water. We think there was no error in sustaining the demurrer to the complaint.

The judgment is affirmed, with costs.

DUTY OF RAILROAD COMPANY AS TO DELIVERY OF GOODS; duty to give notice of arrival; and liability, when terminates: See *Porter v. Chicago etc. Co.*, 71 Am. Dec. 286, and note citing other cases. By delivery of goods at its station, the liability of a railroad company as carrier ceases, and it is then liable as a warehouseman: *American Express Co. v. Hockett*, 30 Ind. 252; *Cincinnati & C. A. L. Co. v. McCool*, 26 Id. 141; *Pittsburgh, C., & St. Louis R'y Co. v. Nash*, 43 Id. 425.

SOLINGER v. JEWETT.

[25 INDIANA, 470.]

GROSS MISTAKE AS TO QUANTITY, IN CONTRACT FOR SALE OF LAND, where the complaining party has not been guilty of any fraud or culpable negligence, nor has otherwise impaired the equity resulting from the mistake, will entitle him to relief whether the contract be executed or executory.

ACTION for recovery of money paid under mistake. The opinion states the facts.

J. A. Stein and G. O. and A. O. Behm, for the appellant.

R. C. Gregory, for the appellee.

By Court, RAY, J. This is an action by the appellee to recover money alleged to have been paid to the appellant under a mutual mistake of facts. It is charged that the appellant sold a farm to the appellee at \$22 per acre, estimating the quantity of land sold at 181 acres, making \$3,982. The land is described in three distinct parcels, and one of these is described as "containing 121 acres, more or less," but contained in fact but 84 and 31-100 acres. The answer is a general denial, with an averment that the land was sold for a gross sum, and that the appellee had an equal or better opportunity for information, and was as well informed as to the quantity of the land as the appellant; that upon the "tract book, in the office of the auditor of said county, the said tract was marked as containing said quantity of 121 acres, and had been so described in subsequent deeds, and the appellant so conveyed the land, 'each party taking the risk of winning or losing by a surplus or deficit.'" The jury returned a general verdict for the appellee, and in answer to interrogatories, found that the land was sold as described in the original government surveys, by the acre; that there was no fraud or deceit willfully practiced upon the appellee at the time of the sale with regard to the number of acres contained in the several tracts of land mentioned in the deed; that the appellee was influenced in his opinion as to the quantity of land purchased by the original surveys, and not by any act or word of the appellant, knowingly, and that the appellant had no knowledge by actual measurement or otherwise of the exact number of acres; that the words "more or less," in the deed, qualifying the quantity, were used without fraud or deceit; that both parties were alike ignorant of any deficiency in the number of acres of land contained in the several tracts sold

and conveyed, but they both estimated the quantity at 181 acres, and neither party contemplated or expected that there would be a loss of more than 36 acres, but the estimate of 181 acres was through the "gross mistake" of both parties; that the appellant, at the time of the execution of the deed, insisted upon being paid for 181 acres of land, at the rate of \$22 per acre, and that the appellee did not discover the deficiency until he had made full payment.

The appellant moved for judgment upon the special finding, and excepted to the action of the court in overruling his motion and rendering judgment for the appellee.

In the case of *Harrison v. Talbot*, 2 Dana, 258, Chief Justice Robertson, after a somewhat careful review of the decided cases involving the principles decisive of this case, deduces from them the following rule: "When it is evident that there has been a gross mistake as to quantity, and the complaining party has not been guilty of any fraud or culpable negligence, nor has otherwise impaired the equity resulting from the mistake, he may be entitled to relief from the technical or legal effect of his contract, whether it be executed or only executory." This we regard as the rule in equity, and the special finding in this case brings it clearly within the rule. The jury expressly find that the deficiency of 36 acres in a tract said to contain 121 acres, more or less, was not contemplated by the parties to the contract, but was the result of the "gross mistake" of both parties.

In the case of *Quessel v. Woodlief*, decided by the court of appeals of Virginia, and reported in 2 Hen. & M. 173, note, the tract of land sold was estimated as containing 800 acres, but was found afterward to comprise but a little over 608 acres, "so that," in the language of the court, "both parties were mistaken in the quantity and number of acres contracted for, and the mistake ought to be rectified in a court of equity, and the appellant allowed a deduction from the price agreed by him to be given for said land for the deficiency in quantity, that deficiency being too great for a purchaser to lose under an agreement for a reputed quantity, notwithstanding the words 'more or less' inserted in the deed, which should be restricted to a reasonable allowance for small errors in survey and variations in instruments."

Again, in *Campbell v. Wilmore*, 6 J. J. Marsh. 209, where a tract of land had been sold and conveyed as containing 124 acres, more or less, and it was subsequently ascertained to contain

132 acres, a judgment was ordered for the additional eight acres, at the price per acre at which the land had been sold. Mr. Justice Washington observed, in the case of *Thomas v. Perry*, 1 Pet. C. C. 49, "that when the land sold is said to contain about so many acres, both the grantor and grantee consider these words as a representation of the quantity which the grantor expects to sell and the grantee to purchase. The words 'more or less' are intended to cover a reasonable exception or deficit. If the difference between the real and the represented quantity be very great, both parties act obviously under a mistake, which it would be the duty of a court of equity to correct." So in *Putnam v. Hill*, 2 Russ. 520, and *Hill v. Buckley*, 17 Ves. 395, this rule is recognized.

We are referred to the case of *Faure v. Martin*, 7 N. Y. 210, as conflicting with this rule. That case is reviewed by the court which pronounced that opinion in the later decision of *Belknap v. Sealey*, 14 Id. 143 [67 Am. Dec. 120]. It is there said that "the case in this court of *Faure v. Martin*, throws no light upon the question. There the agreement was to sell a certain farm described as containing ninety-six acres, be the same more or less, at the price of sixty dollars per acre. The contract was afterward consummated by a conveyance describing the quantity in the same manner, and a mortgage was taken for part of the purchase-money, computed on the number of acres specified at sixty dollars per acre, precisely according to the agreement. The actual quantity was ascertained to be only eighty-six acres, and the suit was brought to stay the foreclosure of the mortgage, after tendering the amount due, with a deduction for the deficiency. The plaintiff offered to prove that there was a mistake in respect to the quantity, induced by the false and fraudulent representations made, both when the agreement and deed were executed. But the fatal objection to the proof and to the suit was, that the complaint alleged neither mistake nor fraud in the agreement, leaving the question one of construction purely; and the construction was held to be that the sale was in bulk, and that the number of acres, and the sum to be paid per acre, were specified only as a mode of arriving at the price in gross. The proof offered was rejected distinctly on the ground that it was inadmissible under the pleadings, and on that ground the cause was decided. I need not say that the construction of a contract is one thing, and the question whether it should be rescinded, or relief granted against it on the ground of fraud or mistake, is quite another."

The case of *Ketchum v. Stout*, 20 Ohio, 453, was decided against the complainant, and relief was refused, on account of the want of equity in the complaint. In deciding the case, it is said: "It seems to the court that the equity of the case is with the defendant." A court of equity would therefore of necessity dismiss the bill.

Nor can we regard the distinction, sometimes referred to in discussing this question, between executory and executed contracts as existing. Such a distinction cannot be sustained upon principle, for the power of a court of equity to grant relief from fraud or mistake in a contract has never been thus restricted, nor do the decisions in this class of cases thus limit it. We have already cited cases where relief has been granted after the deed had been executed. In our opinion, the court committed no error in overruling the motion by the appellant for judgment upon the special findings, and in rendering judgment for the appellee.

The judgment is affirmed, with one fourth of one per cent damages and costs.

GREGORY, J., was absent in this case, having been of counsel.

THE PRINCIPAL CASE IS DISTINGUISHED in *King v. Brown*, 54 Ind. 370, where it is held that when there is no mutual mistake nor fraud practised, the mere fact that upon survey the land is found to be less in quantity than the amount mentioned in the deed is not ground for relief in equity.

LOVE v. WELLS.

[25 INDIANA, 608.]

DEED MADE ON SUNDAY IS VOID.

CONTRACT OTHERWISE VALID, BUT VOID ONLY BECAUSE MADE ON SUNDAY, constitutes an exception to the general rule that void contracts are not susceptible of ratification.

DEED TAKES EFFECT FROM TIME OF ITS DELIVERY, and though signed and acknowledged on Sunday, if delivered on another day it is a valid deed, whatever may be the effect upon the acknowledgment.

ONE WHOSE DEED IS EXHIBITED ON SUNDAY, BUT WHICH BY PROCUREMENT OF GRANTOR is dated upon the preceding day, cannot assert the invalidity of the deed against a subsequent bona fide purchaser.

ACTION to recover possession of realty. The opinion states the facts.

W. E. Niblack and W. H. Wolf, for the appellants.

R. A. Clements, Jr., for the appellee.

By Court, ELLIOTT, J. This was a suit brought by Wells, the appellee, against the appellants, to recover the possession of a certain tract of land.

The defendants below answered by a general denial. The court to which the cause was submitted for trial by agreement of the parties found for the plaintiff. A motion by the defendants for a new trial was overruled; judgment for the plaintiff. The defendants appeal. The evidence is made a part of the record by a bill of exceptions. On the trial the plaintiff gave in evidence a deed of conveyance in fee to himself for the land in controversy, dated October 25, 1845, from Charles F. Wells and wife, said Charles F. being the original patentee from the United States. The defendants then gave in evidence a deed from the plaintiff and wife to the Evansville, Cleveland, and Indianapolis Straight Line Railroad Company, dated the 26th of April, conveying to said railroad company the land in controversy in fee-simple. This deed was acknowledged before a justice of the peace of Daviess County, the certificate of acknowledgment bearing the same date as the deed, and was recorded in the recorder's office of said county on the eleventh day of July, 1856. The consideration stated in the deed is one thousand dollars, the receipt of which is acknowledged. The defendants further proved by the proper deeds of conveyance that the railroad company, for a valuable consideration, sold and conveyed said land to Carpenter and Love in fee, on the 23d of July, 1856, who, on the second day of April, 1858, sold and conveyed the same to Oliver H. Smith. These deeds were also acknowledged and recorded; that from the railroad company to Carpenter and Love was recorded June 30, 1857, and the one from the latter to Smith, April 26, 1858. It further appears by the evidence that since the date of the last-named deed the said Smith has deceased, leaving surviving him three children, who are his heirs, one of whom is the wife of the defendant, Love, "who claims to have the possession and some title to the lands mentioned in the complaint under or through the deeds given in evidence by the defendants."

The defendants having closed their evidence, the plaintiff being sworn, was permitted, over the objection of the defendants, to testify in his own behalf that the deed executed by him to the railroad company, dated April 26, 1856, was in

fact executed on the 27th of April of that year, the same being Sunday. He testified in substance as follows: That although said deed from him to the railroad company purports to have been executed on the twenty-sixth day of April, 1856, yet that in fact it was executed and acknowledged by him and his wife on the 27th of April, 1856, which was Sunday; that Asahel C. Page, who resided in his neighborhood, was, at the time of the execution of the deed, one of the directors of said railroad company, and negotiated the purchase of the land in controversy on behalf of the company; that said Page came to the plaintiff's house the day the deed was executed, bringing with him the justice of the peace who took the acknowledgment, and told the plaintiff he would like to have the deed that day, to which the plaintiff assented. The deed was then prepared, signed, and acknowledged, and by agreement between Page, the plaintiff, and the justice, the deed and the certificate of acknowledgment were dated back one day, so as to make all appear to have been done on Saturday, the 26th, instead of Sunday, the 27th, of the month. At the time the deed was executed "the land had some small improvements on it, but had been mostly vacant and wholly unoccupied since that time; some timber had been taken off since, but not by order of the railroad company that he was aware of." The plaintiff further testified that he had done nothing since to ratify the deed; "that he had never since had possession of the land or exercised any acts of ownership over it, but it had been his intention ever since a short time after the deed was executed to reclaim the land at some time or in some way, but that he never gave the railroad company, or anybody claiming the land under it, any notice that he claimed the land until sometime in June, 1864, when Love, one of the defendants, came to Washington, the county seat, to sell this and some other lands, in pursuance of a notice previously posted; that on that day the plaintiff told said Love 'that he claimed the land in controversy, and protested against its sale'; that in consequence of said notice Love did not offer to sell the land in controversy on that day; that after the deed in question was executed it was left with Browning, the justice of the peace who took the acknowledgment, to be delivered to Page, and he, Browning, took it away the same evening, and the plaintiff never saw it afterward until its production on the trial."

James Wade was also sworn as a witness for the plaintiff, and his evidence substantially corroborated the statements

of the plaintiff as to the circumstances attending the execution of the deed, and that it was executed on Sunday.

The plaintiff, Wells, bases his claim to recover the land exclusively on the ground that his deed to the railroad company, having been executed on Sunday, is void, and therefore conveys no title whatever to the railroad company.

A statute in force at the time the deed was executed provides "that if any person of the age of fourteen years and upwards shall be found on the first day of the week, commonly called Sunday, rioting, hunting, fishing, quarreling, at common labor, or engaged in their usual avocations, works of charity and necessity only excepted, such person shall be fined," etc. An exception is also made in favor of those who conscientiously observe the seventh day of the week as the sabbath, travelers, etc.: 2 Gavin and Hord's Statutes, 481.

In *Link v. Clemmens*, 7 Blackf. 479, it was held, under a similar statute, that a replevin bond executed on Sunday came within the term "common labor," and was therefore void, as being a contract prohibited by law.

And so in *Reynolds v. Stevenson*, 4 Ind. 619, it was held that a promissory note executed on Sunday was void. In that case it is said: "It is admitted that the note in question was made on Sunday. Then the record presents this question: Did the making of it constitute an act of 'common labor?' We think the statute was intended to prohibit every description of secular business not within the exceptions pointed out by itself. The execution of this note was secular business and not embraced by the exceptions. This view is sustained by various adjudications made upon statutes the provisions of which are in effect the same as ours: *Allen v. Deming*, 14 N. H. 183 [40 Am. Dec. 179]; *Towle v. Larrabee*, 28 Me. 464; *Adams v. Hamell*, 2 Doug. (Mich.) 73 [43 Am. Dec. 455]; see also notes to 2 Parsons on Contracts, 764 e."

It is also a general rule of the law that void contracts are not susceptible of ratification. But in *Banks v. Werts*, 13 Ind. 203, it was held that contracts not otherwise obnoxious, but void only because made or executed on Sunday, formed an exception to the general rule, and were susceptible of subsequent ratification. We think the ruling in that case is fully sustained by the authorities there referred to, as well as by the principles of right and reason. Contracts prohibited by law because they are in their nature contrary to public policy, or repugnant to the good of society or public morals, are void, and in their very

nature incapable of subsequent ratification. But contracts void only because made on Sunday, proper and lawful in all other respects, stand on a different basis, and may well form an exception to the general rule that void contracts are incapable of subsequent ratification.

In *Adams v. Gay*, 19 Vt. 353, it is said that contracts made on Sunday should be held an exception, in some sense, from the general class of contracts which are void for illegality. They are not tainted with any general illegality, but are only illegal as to the time in which they are entered into. It is not sufficient to avoid them that they have grown out of a transaction on the sabbath, and although closed upon that day, yet if affirmed upon another day, they then become valid. This court, in *Banks v. Werts*, *supra*, after referring to this and other cases, add: "These decisions relate alone to contracts made on Sunday. They proceed on the ground of a retention of the property, and a subsequent ratification by the parties, and in principle they seem to be correct."

Here, Wells, after executing the deed, abandoned the possession of the land to the railroad company, retained and still retains the purchase-money, set up no claim to the land, and exercised no acts of ownership whatever over it for a period of over eight years. Now, applying to these facts the principles laid down in the cases above referred to, it seems but reasonable to hold that by these acts, both affirmative and negative, the execution of the deed was subsequently ratified by Wells. But we do not place the decision of the case on this ground.

Another question is incidentally presented by the record in this case. A deed takes effect from the time of its delivery, and not from the time it may be signed and acknowledged. It may be drawn up, signed, and even acknowledged on Sunday, but if not delivered until a subsequent day it is a valid deed, whatever might be the effect of the acknowledgment made on Sunday: 2 Parsons on Contracts, 764 g, and authorities there cited. The evidence in the case at bar does not show when the deed was, in fact, delivered. It does not show that it was delivered on Sunday. The only evidence bearing on the point is that of the plaintiff, who, as we have seen, testified that when the deed was executed "it was left with Browning, the justice who took the acknowledgment, to be delivered to Page, and he, Browning, took it away the same evening." Page, to whom Browning was to deliver the deed, was the

agent of the railroad company, but there is no evidence to show that Browning was an agent of the company. He went to Wells with Page, but in taking the acknowledgment he was transacting business for Wells, and not for the railroad company. Wells delivered the deed to Browning, or rather the latter retained it to be delivered to Page, the agent of the company, and, as far as is shown by the evidence, Browning seems to have been the agent of Wells for the delivery of the deed to Page, and the evidence is silent as to when the delivery was actually made.

But assuming that the deed was delivered on Sunday, the question then arises, Can Wells, who executed the deed to the railroad company, set up its invalidity against the subsequent vendees of the company, who purchased the land for a valuable consideration in good faith, and without notice, either actual or constructive, that the deed was executed on Sunday? We are clear in the opinion that he cannot.

The evidence shows that at the instance of Wells, both the deed and the justice's certificate of acknowledgment were antedated, to make it appear that the deed was a valid one, and upon its face it did so appear. In this condition it was delivered to the railroad company, and sent to be recorded. Wells abandoned the possession of the land, and claimed no interest in it. Under these circumstances, it appearing from the deed that the railroad company had a perfect and indefeasible title to the land, Carpenter and Love purchased it for a valuable consideration in good faith, and without any notice whatever that Wells's deed to the railroad company was executed on Sunday; and still, Wells gave them no notice of the fact, nor did he assert any claim or title to the land for years after they sold and conveyed it to Smith. Under these circumstances, if Wells can be allowed to reclaim the land by showing that the deed is void because it was executed on Sunday, it will be permitting him by his own unlawful act to perpetrate a gross fraud upon innocent purchasers. To such an act the law will not lend its aid or give its sanction.

Mr. Story says: "No man can reasonably doubt that if a party, by the willful suggestion of a falsehood, is the cause of prejudice to another, who has a right to a full and correct representation of the fact, his claim ought, in conscience, to be postponed to that of the person whose confidence was induced by his representation. And there can be no real difference between an express representation and one that is naturally

or necessarily implied from the circumstances. The wholesome maxim of the law upon this subject is, that a party who enables another to commit a fraud is answerable for the consequences": 1 Story's Eq. Jur., sec. 384, p. 412. Here, Wells, by executing and delivering the deed to the railroad company, and intentionally giving to it a false date, so as to make it appear valid on its face, enabled the latter to practice a fraud on innocent purchasers. See also *Commonwealth v. Kendig*, 2 Pa. St. 448; *Bloxsome v. Williams*, 3 Barn. & C. 232; *Fennel v. Ridler*, 5 Id. 406; 2 Parsons on Contracts, 765.

The judgment is reversed, with costs, and the cause remanded for a new trial, and for further proceedings not inconsistent with this opinion.

VALIDITY OF SUNDAY CONTRACTS: See *Smith v. Wilcox*, 82 Am. Dec. 302, and the cases cited in the note. That such contracts are void, see *Rogers v. Western Union T. Co.*, 78 Ind. 169; *Callett v. M. B. Church*, 62 Id. 366; and this rule applies to promissory notes: *Gilbert v. Vachon*, 69 Id. 374. Contracts void only because made on Sunday may be ratified, and in this regard stand in a different light from other void contracts: *Heavenridge v. Mondy*, 24 Id. 36. All of the above cite the principal case.

CASES
IN THE
SUPREME COURT
OF
IOWA.

WATSON v. CHESIRE.

[18 IOWA, 202.]

SECOND TRANSFEREE OF PROMISSORY NOTE CANNOT MAINTAIN ACTION AGAINST PAYEE, except by virtue of a contract of indorsement.

SECOND TRANSFEREE OF PROMISSORY NOTE CANNOT MAINTAIN ACTION AGAINST PAYEE for the payee's fraud in the transfer of the note to the first transferee.

TRANSFEREE OF PROMISSORY NOTE WITHOUT RECOURSE IS EXEMPT FROM ORDINARY RESPONSIBILITIES OF INDORSEER; but unless otherwise agreed, he impliedly warrants that the paper is genuine, that it is of the kind or description it purports to be, that the parties to it are *sol jure* and capable of contracting, that it has not been paid, and that he has done nothing and will do nothing to prevent the transferee from collecting it; and he is liable for any fraud practiced by him in the transfer.

TRANSFEREE OF PROMISSORY NOTE WITHOUT RECOURSE IS NOT LIABLE ON PAPER TRANSFERRED, in the cases where an action can be maintained against him, but for the original consideration or its value, or for the fraud practiced.

INDORSEMENT OF PROMISSORY NOTE WITHOUT RECOURSE TRANSFERS TITLE TO NOTE, but not the right to maintain an action for fraud practiced upon such indorser in the transfer of the note to him by the payee.

INSTRUCTION TO JURY IS PROPER, IN ACTION FOR FRAUDULENT REPRESENTATIONS IN TRANSFER OF PROMISSORY NOTE by indorsers without recourse, that if the defendants, or either of them, fraudulently suppressed or withheld facts material to be known, this would be, in law, a fraud, and actionable, if any injury to the plaintiff resulted therefrom.

KNOWLEDGE, BELIEF, OR INTENTION OF WITNESS MAY BE GIVEN IN EVIDENCE, when it is a material fact, giving to the opposite party a liberal scope in the cross-examination; but in such a case the court should state to the jury that in judging of the knowledge, belief, or intention of the witness, they should consider all the facts and circumstances, and that the statement of the witness in that respect is not conclusive.

ACTION by Watson against John Chesire, Wesley Chesire, and John M. Griffith. The promissory note in controversy was executed to the Chesires by one Moore, in part payment of land sold by the Chesires to Moore, and was secured by a mortgage on a portion of the land. The Chesires subsequently indorsed the note without recourse to the defendant Griffith, who in turn indorsed it without recourse to the plaintiff. The plaintiff failed to recover payment from Moore, and now brings this action. Further facts are stated in the opinion.

J. S. Polk, for the appellant.

C. C. Nourse, for the Chesires.

By Court, DILLON, J. 1. The first error assigned by the plaintiff is, that "the court erred in sustaining the defendants' demurrer to the first count of the petition." This makes it essential to set out the substance of this count with accuracy.

It commences by alleging that John and Wesley Chesire held and owned the Moore note and mortgage, describing them; that, January 20, 1860, the said Chesires, for a good and valuable consideration (but not alleging what), sold and assigned said note to their co-defendant, Griffith, whereby they falsely warranted the said note to be genuine, unpaid, and unsatisfied in any way; that afterwards Griffith, assignee as aforesaid, sold and assigned said note to the plaintiff for a good and valuable consideration, whereby he, Griffith, falsely warranted, etc., as above; that plaintiff relied upon said warranties and paid Griffith for said note; that the said note, at the time the same was assigned by the Chesires to Griffith, and by Griffith to the plaintiff, "had been fully paid, extinguished, and nothing was due thereon from the said Moore to the defendants or either of them"; whereby "the defendants fraudulently deceived the plaintiff, to his damage" in the amount of said note. Copies of these assignments are set forth, showing that they were made "without recourse." The first was an assignment in full by J. and W. Chesire to "John M. Griffith or order, without recourse." The next was in blank, as follows: "Without recourse. John M. Griffith."

To this the court sustained a demurrer, both in behalf of the Chesires and of Griffith.

We will consider the case with respect to the Chesires separately and first.

Upon consideration, we think the demurrer was rightly sustained.

It is only by treating this count as founded upon the indorsement that the plaintiff's action against the Chesires has any color or plausibility.

There is, except through the indorsement, no privity between the plaintiff and the Chesires. The latter sold the note to Griffith, and not to the plaintiff. The plaintiff purchased of Griffith, not of the Chesires. No transaction is alleged between the plaintiff and the Chesires. Hence the plaintiff's right to sue the latter, if it exists at all, must exist by virtue of the contract of indorsement.

Now if this count be treated as one *ex contractu* upon the indorsement, it is not maintainable, because the indorsement on its face negatives and rebuts any personal liability on the part of the Chesires. This is the object and effect of an indorsement "without recourse."

Such an indorsement transfers title, but stipulates for exemption from the ordinary responsibility of an indorser. It will not, however, protect the assignor from liability over from fraud and misrepresentation in the assignment of the note. In point, see *Welch v. Lindo*, 7 Cranch, 159; 2 Curtis's ed. 496; *Epler v. Funk*, 8 Pa. St. 468, 469; *Prettyman v. Short*, 5 Harr. (Del.) 360; *Richardson v. Lincoln*, 5 Met. 201; *Rice v. Stearns*, 3 Mass. 225 [3 Am. Dec. 129]; *Waite v. Foster*, 33 Me. 424; *Goupy v. Harden*, 7 Taunt. 159, *per* Dallas, J.; Chitty on Bills, 218, 225, 235; Story on Promissory Notes, sec. 146; *Lyons v. Miller*, 6 Gratt. 427 [52 Am. Dec. 129].

Suppose it to be true that, in the transfer of the Moore note by the Chesires to Griffith, the latter was deceived and defrauded. This would give Griffith his right of action against the former. Suppose it to be true, also, that the plaintiff was deceived and defrauded by Griffith. This would give him a right of action against the latter. He could not sue the Chesires for the fraud they practiced upon Griffith.

So that the reasoning drives us back to the point at which we started, viz., the plaintiff cannot sue the Chesires *ex contractu*, having had no transaction with them except upon the indorsement. If the first count is treated as being founded upon that, it fails, because the indorsement itself not only does not create, but expressly avoids, a cause of action: *Vide* authorities above cited.

The case presents the question, What, in the absence of

special contract, are the obligations of the transferrer of negotiable paper, who indorses it without recourse? It seems to us that the obligations of a transferrer of such paper, by indorsement without recourse, are substantially the same as those of a transferrer of such paper when payable to bearer by delivery merely.

It is a clear and well-settled doctrine, that such a transfer does not make the party liable as indorser. When he indorses paper without recourse, or transfers it (if payable to bearer or if indorsed in blank) by delivering merely, without putting his name upon it, he ceases to be a party to the paper. He cannot be made liable as a party to or upon the instrument.

There may be a liability in such cases, but it arises upon the transaction, upon the facts of the case, to be asserted in an action for the original consideration, its value, or for fraud practiced, and not upon the indorsement or upon the paper transferred. Speaking of the same general subject, in the well-known case of *Jones v. Ryde*, 1 Marsh. 157, S. C., 5 Taunt. 489, Gibbs, C. J., says: "The ground of resisting this claim is, that it was a negotiable security without indorsement; and that when the holder of a negotiable security passes it away without indorsing it, he means not to be responsible upon it" This doctrine was fully discussed in the case of *Fenn v. Harrison*, 3 Term Rep. 757; and the proposition is true, but only to a certain extent. "If a man pass an instrument of this kind without indorsing it, he cannot be sued as indorser, but he is not released from the responsibility which he incurs by passing an instrument which appears to be of greater value than it really is." And this case is recognized as authority in the text-books, and in England in subsequent cases: *Wilkinson v. Johnson*, 3 Barn. & C. 428; and in this country: *Cabot Bank v. Morton*, 4 Gray, 156.

The accepted doctrine on this subject may be thus stated: Where a note is transferred without recourse, equally as when it is transferred by delivery only, the transferrer is exempted from all the ordinary responsibilities which attach to such a transfer: See authorities first in this opinion cited.

But he does not, unless such is the agreement, understanding, or contract of the parties, stand free from all obligations. Thus, unless otherwise agreed, he warrants that the paper so transferred is genuine, and not forged or fictitious: *Jones v. Ryde*, *supra*; *Fuller v. Smith*, Ryan & M. 49; S. C., 1 Car. & P.

197; Chitty on Bills, 245; Story on Promissory Notes, sec. 118; *Aldrich v. Jackson*, 5 R. I. 218; 2 Parsons on Notes and Bills, c. 2, sec. 2, p. 37, and authorities; *Lyons v. Miller*, 6 Gratt. 427 [52 Am. Dec. 129]; *Morrison v. Currie*, 4 Duer, 79; *Cabot Bank v. Morton*, *supra*; *Rieman v. Fisher*, 4 Am. Law Reg. 433. He warrants by implication, nothing to the contrary being shown, that it is of the kind and description that it purports on its face to be: *Allen v. Pegram*, 16 Iowa, 163, in relation to illegal bank stock; *Gompertz v. Bartlett*, 2 El. & B. 849; S. C., 24 Eng. L. & Eq. 156, where the vendor of a bill was held liable, though he did not put his name upon it; *Young v. Cole*, 3 Bing. N. C. 724, as to liability of vendor on the sale of invalid Guatemala bonds; and see, further, the authorities above referred to, and *Kempson v. Sanders*, 11 Bing. 5; Redfield on Railways, 50, note; Hilliard on Sales, p. 456, sec. 37; *Eaton v. Mellus*, 7 Gray, 566, which decides that there is an implied warranty that the assignor has done nothing, and will do nothing, to prevent the assignee from collecting the claim assigned.

So there is an implied warranty, unless it is otherwise agreed, that the parties to the instrument are *sui juris*, and capable of contracting: *Theall v. Newell*, 19 Vt. 202; *Lobdell v. Baker*, 1 Met. 193 [35 Am. Dec. 358]; S. C., 3 Id. 469; *Jones v. Crosthwaite*, 17 Iowa, 393, and cases; 2 Parsons on Notes and Bills, 39; but no implied warranty of their solvency: Chitty on Bills, 245; 2 Parsons on Notes and Bills, 41; *Epler v. Funk*, 8 Pa. St. 468; *Burgess v. Chapin*, 5 R. I. 225. So there is an implied warranty that the instrument transferred has not been paid. And generally, it is laid down by Mr. Parsons (2 Notes and Bills, c. 2, p. 41), who follows and closely copies Mr. Chitty (Bills, 247), that "in all cases where the assignor" (we may add whether by delivery or by indorsement, made "without recourse"), "of a bill or note knows it to be of no value, and the assignee receives it in good faith (not aware of the fact), paying a valuable consideration of any kind, the assignor may be compelled to repay or return the consideration thus received." And see *Burgess v. Chapin*, 5 R. I. 225, which holds an assignor without indorsement to be liable upon the ground of fraud,—the rule of *caveat emptor* otherwise applying.

But in all such cases the action is not upon the paper transferred, but against the vendor or transferor upon and for the original consideration or its value, or for the fraud practiced; and the latter is "liable to the vendee," to use the language of Ames, C. J., in *Aldrich v. Jackson*, 5 R. I. 218, "for what

he has received from him on the ground of failure of consideration." Without quoting, see 2 Parsons on Notes and Bills, 37, and note; *Kephart v. Butcher*, 17 Iowa, 240; Chitty on Bills, 246, and authorities cited; Story on Promissory Notes, 5th ed., sec. 117, and cases cited in notes 4 and 5; *Welch v. Lindo*, 7 Cranch, 159; *Prettyman v. Short*, 5 Harr. (Del.) 360; *Eaton v. Mellus*, 7 Gray, 566, holding that in the absence of fraud in the assignor, the assignee can only recover of him the amount of the consideration paid for the assignment, with interest.

If the foregoing views are correct, it follows that the plaintiff, holding simply the indorsement of the Moore note "without recourse," could not sue the Chesires on the indorsement. His remedy, if he could not make out a case upon the facts, would be a special one against Griffith, of whom he purchased the note, and to whom he made payment therefor. So Griffith's remedy would be against the Chesires. Under our statute it may be that Griffith might specially assign his cause of action against the Chesires to the plaintiff; but the mere indorsement of the note without recourse would not have this effect. Such an indorsement operates simply to transfer the title to the note—not an independent cause of action. The demurrer as to the first count of the petition was beyond doubt properly sustained as to the Chesires.

And if we are right in considering it as being intended as one upon the indorsement, and not as one intended and adapted to recover the consideration paid for the note, it was also properly sustained as to Griffith.

2. The second count in the petition charged the defendants jointly with falsely and fraudulently representing to the plaintiff, with a view to induce him to purchase the said note and take an assignment without recourse, that it was all right and wholly unpaid, etc.; whereas the contrary was true, etc.

This clearly set out a cause of action,—a case of fraud. Issue was taken on this count, and the cause was tried thereon by a jury, who found for the defendants.

The plaintiff complains of the charge of the court, but, as we think, without foundation. The court charged, in substance, that if the fraud alleged was proved, the plaintiff should recover against all the defendants, or those who committed the fraud. The charge defined the elements or ingredients necessary to constitute fraud. No complaint on this head is made. The court charged that if the defendants or either of them fraudulently suppressed or withheld facts material to

be known, this would be in law a fraud, and actionable, if any injury to the plaintiff resulted therefrom.

From a careful examination of the charge and instructions of the court, in connection with the testimony, we think the cause was most fairly and intelligently put to the jury.

If the directions to the jury are exceptionable at all, we think the defendants, rather than the plaintiff, have the better right to complain. We see no reason to interfere on the ground that the verdict was against the weight of evidence.

3. On the trial the defendant, Wesley Chesire, was called as a witness for the defendants. He testified that the plaintiff, near the time he obtained the note of Griffith, told him (the witness) that he was about to trade for it. "I told Watson," says the witness, "that he had better not trade for it; that Griffith had been out to Moore's, and Moore said he would not pay the note; that we had misrepresented a piece of timber land to him. There was something said about the defense Moore had (or claimed to) set up. I told him that we did not misrepresent it." The witness was then asked this question: "State what you know about the truth of the representations you made to Watson in regard to Moore having a defense to the note, and what you then believed in relation to it." Objected to by plaintiff; objection overruled. Witness answered: "I do not think he had any just defense." To a similar question he also answered: "I did not believe that Moore had a defense to the note."

The error assigned is, that it is not permissible to allow a witness to testify as to his belief, especially in reference to a question upon which, in a case of fraud, the whole cause usually turns.

We admit that it is going a great way to allow this to be done, especially where the witness is a party to the suit, testifying at his own instance and in his own behalf. Yet the authorities do hold that when the knowledge, belief, or intention of the witness is a material fact, it may be testified to the jury, the same as any other fact; giving to the opposite party a liberal scope in the cross-examination: *Thatcher v. Phinney*, 7 Allen, 146, 149; *Lombard v. Oliver*, 7 Id. 155; *Fisk v. Chester*, 8 Gray, 506. So in *Seymour v. Wilson*, 14 N. Y. 567, it was held that on an issue of fact as to whether a transfer of property was fraudulent, and in a case where the facts did not necessarily prove fraud, but only tended to that conclusion, it was competent, where the transferrer is a witness, to

inquire of him whether in making the transfer he intended to delay or defraud his creditors. "Such evidence," says the court, "should be received for what it may be considered worth."

In such case the court should, if asked, and perhaps on its own motion, state to the jury, in substance, that in judging of a man's belief, knowledge, or intention, they should consider all the evidence and all of the circumstances; that his statement in that respect was not conclusive upon them; but they should arrive at their own conclusion upon the whole case, including, of course, the statement of the witness, and giving it such weight as under all the circumstances they believe it fairly entitled to.

It follows that the court did not err in permitting the questions to be answered.

Affirmed.

COLE, J., having been consulted in the cause, took no part in its determination.

INDORSEMENT "WITHOUT RECOURSE."—A restrictive mode of transferring negotiable paper, well recognized by the mercantile world and by the law, is that of indorsement "*sans recours*," or "without recourse." The transferor who thus indorses the paper transfers a good title, but relieves himself from liability on the indorsement itself. It is therefore a peculiarly appropriate indorsement for an agent to make in transferring his principal's paper: See *Goupy v. Harden*, 7 Taunt. 159, 163; S. C., 2 Marsh. 454. The term is necessarily applicable only to an indorser, and not to an original promisor: *Childs v. Wyman*, 44 Me. 433; S. C., 69 Am. Dec. 111.

Although it is usual in making such an indorsement to use the words "*sans recours*," "without recourse," or "without recourse to me," yet any words showing the same intention of the indorser will have the same effect. As a transfer of "all my right and title in the within note, to be enjoyed in the same manner as may have been by me": *Hailey v. Falconer*, 32 Ala. 536; or, "I order the contents of this note to be paid to M. R., at his own risk": *Rice v. Stearns*, 3 Mass. 225; S. C., 3 Am. Dec. 129; or, "Indorser not holden": *Ticonic Bank v. Smiley*, 27 Me. 225. But if an indorsement is intended to be without recourse, it should indicate that intention; for it is well settled that an unqualified indorsement, in full or in blank, cannot be controlled as against a subsequent *bona fide* holder without notice, or even as against the immediate indorsee, by evidence of a parol understanding or agreement that the transfer should be without recourse: 1 Daniel on Negotiable Instruments, secs. 699, 719; 2 Randolph on Commercial Paper, sec. 779; *Dale v. Gear*, 38 Conn. 15; S. C., 9 Am. Rep. 353; *Odam v. Beard*, 1 Blackf. 191; *Wilson v. Black*, 6 Id. 509; *Lee v. Pile*, 37 Ind. 107, 110; *Sands v. Wood*, 1 Iowa, 263; *Skinner v. Church*, 36 Id. 91; *Doolittle v. Ferry*, 20 Kan. 230; S. C., 27 Am. Rep. 166; *Crocker v. Greichell*, 23 Me. 392; *Lawrence v. Dobyne*, 30 Mo. 196; *Rodney v. Wilson*, 67 Id. 123; *Lewis v. Dunlap*, 72 Id. 174; *Hill v. Shields*, 81 N. C. 250; S. C., 31 Am. Rep. 499; *Charles v. Denis*,

42 Wis. 56; S. C., 24 Am. Rep. 383; *Martin v. Cole*, 104 U. S. 30; *contra*, *Pike v. Street*, Moody & M. 266. The legal effect of the written indorsement cannot be controlled by parol in either case; and in case of a *bona fide* holder, the general principles of negotiable instruments would prevent the agreement from being set up. Yet, where the agreement between the indorser and indorsee creates such an equitable relation between them, in respect to the indorsement without restriction, that the indorser is, in effect, an accommodation indorser, such agreement may be proved: *Dale v. Gear*, 39 Conn. 89; and it may be proved against the indorsee in a case involving trust and fraud in obtaining the paper indorsed simply in blank: *Hill v. Ely*, 5 Serg. & R. 363; and see *Harrison v. McKim*, 18 Iowa, 485. Where an indorser omitted by mistake to write over his indorsement "without recourse," these words may be added by consent of both parties, without any new consideration, at any time while his indorsee is the owner of the note, and if they are afterwards stricken from the note by such indorsee without the indorser's consent, these facts may be shown in an action by the indorsee against the indorser: *Beal v. Wood*, 5 Mo. App. 591. The indorser may show that the words "without recourse" were written by him at the time he indorsed the note: *President etc. of Fitchburg Bank v. Greenwood*, 2 Allen, 434.

An indorsement without recourse does not impair the negotiable quality of the paper: *Rice v. Stearns*, 3 Mass. 225; S. C., 3 Am. Dec. 129; *Upham v. Prince*, 12 Mass. 14, 15; *Epler v. Funk*, 8 Pa. St. 468; *Lomax v. Picot*, 2 Rand. 247, 260. Nor will such an indorsement be of itself sufficient to put a subsequent indorsee upon inquiry as to any defense which might be set up to the paper by a prior party: *Stevenson v. O'Neal*, 71 Ill. 314; *Borden v. Clark*, 26 Mich. 410; *Kelley v. Whitney*, 45 Wis. 110; *Epler v. Funk*, *supra*; *Lomax v. Picot*, *supra*; *Bisbing v. Graham*, 14 Pa. St. 14; S. C., 53 Am. Dec. 510; but see *Richardson v. Lincoln*, 5 Met. 201, 204; *Pierce v. Ricker*, 16 N. H. 322; S. C., 41 Am. Dec. 728. The payee of a promissory note, who reacquires it after indorsing it without recourse, then stands in the position of an ordinary transferee: *Calhoun v. Albin*, 48 Mo. 304.

The peculiar effect of an indorsement without recourse is that it transfers the title to the indorsee, but without rendering the indorser personally responsible on the paper: Chitty on Bills, 13th Am. ed., *228, 235, 242; Story on Promissory Notes, sec. 146; Byles on Bills, 7th Am. ed., *154; 1 Daniel on Negotiable Instruments, secs. 670, 700; 1 Edwards on Bills and Notes, sec. 398; 2 Randolph on Commercial Paper, sec. 720; *Hailey v. Falconer*, 32 Ala. 536; *Challiss v. McCrum*, 22 Kan. 157, 160; S. C., 31 Am. Rep. 181; *Waite v. Foster*, 33 Me. 424; *Richardson v. Lincoln*, 5 Met. 201, 204; *Craft v. Fleming*, 46 Pa. St. 140; *Ober v. Goodridge*, 27 Gratt. 878; *Lyon v. Ewings*, 17 Wis. 61, 70; *Crosby v. Roub*, 16 Id. 616; S. C., 84 Am. Dec. 720; *Welsh v. Lindo*, 7 Cranch, 159. The effect is the same as a transfer of paper, payable to bearer, by delivery: See the principal case; *Challiss v. McCrum*, *supra*; Cal. Civ. Code, sec. 3118. Although the indorser incurs no liability on the paper, he nevertheless impliedly warrants that the signatures of prior parties thereon are genuine: *Dumont v. Williamson*, 18 Ohio St. 515; and that there is no want of or illegality in the consideration between the original parties which can be set up against the indorsee: *Challiss v. McCrum*, *supra*; *Ticonic Bank v. Smiley*, 27 Me. 225; *Blething v. Lovering*, 58 Id. 437; *Frazer v. D'Inouilliers*, 2 Pa. St. 200; S. C., 44 Am. Dec. 190; *Hannum v. Richardson*, 48 Vt. 508; S. C., 21 Am. Rep. 152; but see *Rayne v. Ditto*, 27 La. Ann. 622. The indorser would therefore be liable if a set-off by the maker of a note against the payee could be claimed against the indorsee: *Ticonic Bank v. Smiley*,

supra; or where the note is not the legal obligation of the maker to the full amount, on account of usury: *Challis v. McCrum*, *supra*; or where the note is void because given for intoxicating liquors: *Hannum v. Richardson*, *supra*, and the like. So an indorser without recourse is liable if he sells a bill which cannot be enforced against the parties for want of a stamp: *Gomperts v. Bartlett*, 2 El. & B. 849; S. C., 24 Eng. L. & Eq. 156. There is also an implied warranty that the parties to the instrument are capable of contracting, and that the indorser has a good title to the paper: See the principal case; 1 Daniel on Negotiable Instruments, sec. 670. The indorser is further responsible for any fraud practiced by him in the transaction of the transfer: *Prettyman v. Short*, 5 Harr. (Del.) 360; *Dayton v. Tillotson*, 39 Iowa, 404, 405, citing the principal case. But there is no warranty that the prior parties are solvent: See the principal case. When the indorser is liable, the liability accrues when the indorsement is made, and the statute of limitations then begins to run: *Blething v. Lovering*, 58 Me. 437.

THE PRINCIPAL CASE IS CITED in *Miller v. Dugan*, 36 Iowa, 437, to the point that the assignor of a judgment without recourse is not discharged, unless otherwise agreed, from liability upon an implied warranty that it is a valid and subsisting judgment for the amount it purports to be; it is referred to in *Scofield v. Moore*, 31 Id. 244, in holding that the assignors of a judgment incurred no personal liability under their assignment; in *State v. Wooderd*, 20 Id. 548, 549, on the point that an indorser is liable to his indorsee for failure of consideration; and in *Hunter v. Aylworth*, 38 Id. 213, on the point that the assignor of a contract for the purchase of school lands undertakes that all the legal incidents of the contract shall pass to his assignee, and that he will do nothing to abridge the legal rights of the latter. It is also cited in *Bank of Montreal v. Thayer*, 2 McCrary, 6, S. C., 7 Fed. Rep. 625, to the effect that to allege in a pleading that representations were made with intent to deceive would add nothing to the allegation that they were falsely and fraudulently made; and in *Browne v. Hickie*, 68 Iowa, 333, to the point that when it is material to determine the motive or intention with which an act was done, the testimony of the one doing the act as to his motive or intention is competent evidence.

DONALDSON v. MISSISSIPPI AND MISSOURI R. R. Co.

[18 IOWA, 280.]

CORPORATION IS LIABLE IN CIVIL ACTION FOR WRONGFUL ACTS OF ITS SERVANTS, DONE IN ITS EMPLOYMENT, CAUSING DEATH OF PERSON, under section 4111 of the Iowa Revision of 1860, providing that "where a wrongful act produces death, the perpetrator is civilly liable for the injury."

MASTER IS LIABLE FOR TORTIOUS ACTS OF SERVANTS, done in his employment.

CORPORATION IS LIABLE FOR WRONGFUL ACTS OF ITS SERVANTS, done in its employment, and may even be indicted for acts of misfeasance or non-feasance.

SUBCONTRACTOR FOR BUILDING BRIDGES FOR RAILROAD IS NOT CO-SERVANT with those employed by it in managing its trains, so as to relieve the railroad from responsibility for injuries caused to the former through the negligence of the latter.

VERDICT FOR PLAINTIFF IN ACTION FOR NEGLIGENCE WILL NOT BE SET ASIDE by the supreme court, where the evidence in the case is conflicting, and is properly submitted to the jury under such instructions as could not have prejudiced the defendant.

THAT DECEASED WAS RIGHTFULLY AND NOT NEGLIGENTLY OR IMPROPERLY ON TRACK MUST BE SHOWN BY PLAINTIFF, either by direct testimony, or by presumption from facts and circumstances proved, in an action against the railroad company to recover damages for negligently running over and killing the deceased.

EVIDENCE IN CHIEF MAY BE INTRODUCED AFTER PARTIES HAVE RESTED, IN DISCRETION OF COURT, and this discretion will only be reviewed by the supreme court in case of manifest abuse.

EVIDENCE, AS AFFECTING QUESTION OF DAMAGES FOR NEGLIGENTLY CAUSING DEATH OF PERSON, MAY BE PROPERLY GIVEN, of exact situation of the deceased, his occupation, annual earnings, age, health, habits, and estate, if the jury be guarded by an instruction that if they find for the plaintiff, they should allow such damage as the estate of the deceased suffered pecuniarily by his death, but should not allow anything on account of his pain and suffering before his death, or for the grief and distress of his family on account thereof, or for the loss of his society.

WITNESS IS NOT QUALIFIED TO TESTIFY AS EXPERT AS TO EXPECTATION OF LIFE at a certain age, where he has had but an experience of six months as a life insurance agent.

CARLISLE TABLES ARE ADMISSIBLE IN EVIDENCE TO SHOW EXPECTATION OF HUMAN LIFE, they being standard tables on that subject.

ACTION by the administrators of one Brickel to recover damages for the death of Brickel, alleged to have been caused by the wrongful act of the defendant. Brickel, who was a subcontractor for the building of bridges for the defendant, was engaged, on the day of the injury, in loading timbers on the defendant's cars, on the south side of the depot at Iowa City. After he had finished, he, with his partner and four or five employees, started to go across the several tracks of the defendant to the north side of the depot to assist another person in loading a wagon on a car. Some employees of the defendant were engaged in making up a freight train, and in clearing the main track for the arrival of a train, then nearly due. Just before the deceased and the others had started to go across the tracks, the depot-engine with a number of heavily loaded cars had passed along one of the interior tracks going east, and had, unobserved to those crossing, been switched upon the north track, and was being pushed west along that track, down the grade, without giving any signals, at a greater speed than usual. Some platform-cars standing on the north track were struck by the train as the deceased was in the act of crossing, and were driven rapidly along the track, knocking the deceased down, and running over and killing him. Some

of the persons with the deceased narrowly escaped. The plaintiff had a verdict for fifteen hundred dollars, upon which judgment was entered accordingly, and the defendant appealed. The questions in the case appear from the opinion.

Edmonds and Ransom, and Cook and Drury, for the appellant.

Clark and Brother, Clarke and Davis, and G. Folsom, for the appellees.

By Court, COLE, J. 1. At common law no right of action for the recovery of damages existed against one who had caused the death of another. This rule was founded partly upon the theory that the civil remedy was merged in the public offense. Our statute has changed this rule, and provides (Revision, sec. 4110 [2500]), "the right of civil remedy is not merged in a public offense, but may, in all cases, be enforced independently of and in addition to the punishment of the latter." Revision, sec. 4111 [2501]: "Where a wrongful act produces death, the perpetrator is civilly liable for the injury."

The English statute, which was enacted before ours, provides that, "when death shall be caused by the wrongful act, neglect, or default, such as would (had death not ensued) have entitled the party to an action, an action may be maintained," etc. The New York statute, passed a year after the English, also expressly includes cases of neglect and default, and makes the employee, through whose wrongful act, neglect, or default the death was caused, liable to indictment, etc., as for a felony.

Aside from the express requirement of our Revision, that "its provisions, and all proceedings under it, shall be liberally construed, with a view to promote its objects and assist the parties in obtaining justice" (Revision, sec. 2622), we should have no serious difficulty in holding that any action could be maintained under our statute which could be under the English or New York law. In view of such express rule of construction, the question is more free from doubt.

While an employer is not responsible for all the torts of his employee, and certainly not for those of which the employee is guilty when they are entirely aside from his service, and have no connection with his duties, yet the general principle is, that the employer is responsible for the tortious act of his employee, which was done in his service: 1 Parsons on Contracts, 87. And an action for a wrong lies against a corporation, when the thing done is within the purpose of the incorporation, and it

has been done in such a manner as to constitute what would be an actionable wrong if done by a private individual: *Green v. London General Omnibus Co.*, 6 Jur., N. S., pt. 1, 228, cited in 8 Am. Law Reg. 702. That a corporation may be liable for the wrongful act of its servants, as well as for their neglect and default, is clear upon both principle and authority. A corporation is an attribute of individuality, conferred upon a collective and changeable body of persons; and while, by the favor of the law, this artificial individuality is enjoyed by a corporation, it is difficult to see why the liability of such individuality should be less, in any given case, than that of natural individuals: *Thayer v. St. Louis, Alton, and Terre Haute R. R. Co.*, 22 Ind. 26.

Nor is the argument, founded upon the idea that a corporation is not subject to indictment, well founded. It is true that Lord Holt is reported to have laid it down, generally, that a corporation is not indictable at all, though its individual members are: *Anonymous*, 12 Mod. 559. But this doctrine has been overturned to a very great extent, the earlier cases holding that Lord Holt's rule did not apply to cases of non-feasance, and therefore that corporations were liable to indictment for not repairing a bridge, a road, or wharf, where by statute or prescription it was bound so to do, but not for acts of misfeasance. But this distinction, after full consideration of the authorities in the case of *Regina v. Great North of England Railway*, 9 Q. B. 315, was overthrown, and corporations held liable to indictment for misfeasance as well as non-feasance. This doctrine has been approved in this country: *State v. Morris and Essex R. R.*, 23 N. J. L. 360; *Commonwealth v. New Bedford Bridge Co.*, 2 Gray, 339; *Commonwealth v. Nashua and Lowell R. R.*, 2 Id. 54; *Commonwealth v. Vermont and Massachusetts R. R.*, 4 Id. 22; *State v. Vermont Central R. R.*, 27 Vt. 103; see also Redfield on Railways, 515 et seq.; 1 Bishop's Crim. Law, secs. 306-310; 1 Wharton's Am. Crim. Law, secs. 85-90; Angell and Ames on Corporations, secs. 394-396. And still later it has been decided that an incorporated company might be sued for libel transmitted by their telegraph: *Whitfield v. Southeast R. R. Co.*, 4 Jur., N. S., pt. 1, p. 688; *Philadelphia, W., & B. R. R. v. Quigley*, 21 How. 202, and authorities cited. And for an assault: *Eastern Counties R. R. Co. v. Broom*, 6 Ex. 314. And for false imprisonment: *Chilton v. London and Croydon R. R. Co.*, 16 Mees. & W. 212. And that they might also be guilty of acts maliciously committed with

a view to injure individuals or rival companies: *Green v. London General Omnibus Co.*, 6 Jur., N. S., pt. 1, p. 228. And that a corporation may maintain an action for libel for words published of them concerning their trade or business, by reason of which they have suffered special damages: *Trenton Mut. L. & F. Ins. Co. v. Perrine*, 23 N. J. L. 402 [57 Am. Dec. 400]. It has not been controverted, however, as yet, by any authority, that a corporation cannot be guilty of perjury nor of treason. But Mr. Bishop says no reason appears why a corporation, having by law the power to act, should not also have by law the power to intend to act; and mere intentional wrong acting is all which is necessary in a class of criminal cases: 1 Bishop's Crim. Law, 2d ed., sec. 307.

The objection, therefore, to the maintenance of this action against the corporation, under our statute, on the ground that a master or employer is only liable for the neglect or default of his servant or employee, and not for his wrongful acts, is not well taken. Nor is the further objection that the statute, by using the word "perpetrator," gives a civil remedy for the damages resulting from criminal acts only, of which it is erroneously assumed a corporation could not be guilty; and hence if the construction of the statute contended for by appellant's counsel was the correct one, it would not, under the authorities cited, preclude this action.

The liability of the corporation, however, either civilly or criminally, would not probably be held to exempt the immediate agent in doing the wrong from original or concurrent liability therefor.

2. The deceased, although a subcontractor for the building of bridges, and therefore indirectly in the employ of the defendant, yet his duties were so entirely in another department and wholly disconnected with operating the road as that his relation to the employees managing the train which ran over him cannot be, in any proper sense, said to be that of a co-servant: *Gillenwater v. Madison & Ind. R. R.*, 5 Ind. 339 [61 Am. Dec. 101]; *Philadelphia & R. R. Co. v. Derby*, 14 How. 468; 1 Parsons on Contracts, 89, and authorities cited, note.

Nor does the proof disclose that the person for whom he started to render voluntary assistance in loading a wagon on the cars was a servant of the defendant.

The rule, therefore, that corporations having employed persons of ordinary skill and care, by whose unauthorized act or negligence another is injured, cannot be held liable for such

injury, as laid down in *Degg v. Midland R. R. Co.*, 5 Am. Law Reg. 500, in the court of exchequer, to which we are referred by counsel, has no application in this case. That rule is the same as that settled by the leading cases of *Priestley v. Fowler*, 3 Mees. & W. 1; *Farwell v. Boston and Worcester R. R. Co.*, 4 Met. 49; and *Murray v. S. C. R. R. Co.*, 1 McMull. 385 [36 Am. Dec. 268]; and followed in very many cases since.

3. Upon the question as to what negligence on the part of the deceased would preclude a recovery, the court below instructed the jury as liberally for defendant as any rule recognized by the courts of the country would justify.

The court instructed the jury that, "it must appear to you that the act was committed without the fault or wrong of the deceased. It is the duty of a person approaching a railway track to take care against the approach of danger; and inasmuch as it is impossible for a train to be suddenly stopped (a fact which is generally known), therefore a person approaching a track in sight of a moving train should use all reasonable care to avoid possible danger, and should take notice of the fact. It is an essential element in plaintiff's case that deceased was rightfully upon the track.

"The 'wrongful act' of the defendant must have produced death; that is, the death in this case must have been produced solely by the wrongful act of the railroad company; for if Brickel contributed to it by any wrong of his, there can be no recovery.

"To authorize a recovery for injuries done by a railroad company, it is not enough to show the company guilty of negligence, but it must appear that the injured party was not also negligent and blamable. It is the duty of the party injured, as well as the party accused of negligence, to use all reasonable means to foresee and prevent injury; and if such means are not employed by the injured party, there can be no recovery for the injury."

The last paragraph was drawn by defendant's counsel and given at their request. Without now determining whether the rule as thus given to the jury is the correct one, it seems to be as liberal for defendant as any authority can be found to sustain. There is a modification of this rule which has the merit of much fairness (whatever may be the difficulty in its application) stated in the case of *Scott v. Dublin and Wicklow R'y Co.*, 11 L. R. C. L. 377, where it was held, "nor can he re-

cover, notwithstanding there is negligence on the part of the defendant, if he has so far contributed to the accident by the want of ordinary care, that but for that the accident would not have happened; but though the plaintiff has so contributed to the accident, he is not disentitled to recover, if the defendant might, by ordinary care, have avoided the consequences of the plaintiff's neglect; and when, but for the plaintiff's negligence at the time, he might have escaped the consequences of the defendant's negligence, he cannot recover."

The evidence in this case upon the question of negligence is conflicting, and was properly submitted to the jury under such instructions as could not have prejudiced the defendant. Under such circumstances, whatever may be our view aside from the verdict as to the weight of evidence, the verdict of the jury cannot, according to our previous holdings, be set aside: *Gordon v. Pitt*, 3 Iowa, 385; *Russ v. Steamboat War Eagle*, 14 Id. 363, and authorities cited; *McKay v. Thorington*, 15 Id. 25.

4. The questions of fact as to whether the deceased was in the employ of the defendant in the same department with those by whose act the injury was caused, so as to make him a co-servant, and as to his being rightfully upon the track, were also fairly submitted to the jury upon the conflicting testimony of the witnesses, and proper instructions of the court. The verdict is therefore conclusive upon these questions: See authorities last above cited.

5. After the plaintiffs had closed their evidence in chief and rested, and the defendant likewise, the plaintiff then called other witnesses to prove the general custom of the public to cross the defendant's track and depot at the place where Brickel was killed, in order to show that he was rightfully there. The defendant objected to the testimony of such witnesses, on the ground that it was irrelevant and not rebutting, but testimony in chief, and plaintiffs had introduced testimony thereon in chief. The court overruled the objection, and admitted the testimony which was material. It is true that it devolved upon the plaintiffs, in order to make out their case, to show that the deceased was rightfully, and not negligently or improperly, upon the track. This fact may be shown by direct testimony, or by presumption arising from facts and circumstances already proved in the case: *Johnson v. Hudson River R. R. Co.*, 20 N. Y. 65 [75 Am. Dec. 375]. To have sustained the objection and excluded the testimony would

have been error sufficient to justify the reversal of the judgment at the instance of the plaintiff, as was held by this court in the case of *Davidson v. Overhulser*, 3 G. Greene, 196; *Lawson v. Campbell*, 4 Id. 413. Aside from these rulings, however, we should be inclined to hold that it was a matter of discretion in the district court, and only reviewable by this court in case of manifest abuse: *Rutledge v. Evans*, 11 Iowa, 287; *Samuels v. Griffith*, 13 Id. 103; *Wheeler v. Smith*, 13 Id. 564. The defendant then offered to recall two witnesses and re-examine them upon the same question, which, on objection by the plaintiff, was refused. In our view of the case, there was no abuse of discretion in this refusal: See last-cited cases.

6. The plaintiff's counsel, in making his case by the testimony, asked the witness to state the family and their respective ages, left by the deceased, and also his occupation, his annual earnings, and his property, to all of which the defendant objected, on the ground that the questions were improper, impertinent, and an incorrect mode of ascertaining the damages. The objections were overruled, the ruling excepted to, and the witnesses answered. The court instructed the jury that if they should find for the plaintiff, they would find such damage as the estate of Brickel suffered in a pecuniary way by his death; that they should not allow anything on account of the pain and suffering of the deceased before his death, or for the grief and distress of his family on account of his death, or for the loss of his society.

When a jury is thus guarded against an allowance of damages for improper causes, it would seem that no prejudice could result if the jury should be fully advised by the testimony of the exact situation of the deceased, his occupation, annual earnings, age, health, habits, family, and estate. Many of these, and possibly other facts, may have a just influence in determining the pecuniary damage to the estate. We would not be understood, however, as determining that evidence as to the number and ages of his children is strictly proper.

7. The plaintiff introduced and proved by a witness that he, the witness, was a life insurance agent, resides at Iowa City, and had been for six months then last past; that he had the seventeenth annual report of the New York Life Insurance Company with him, on page 21 of which were the Carlisle Tables of Mortality; and stated that the expectation of life at the age of forty-one years (which was the age of the deceased)

was twenty-six and ninety-seven hundredths years. The Carlisle Tables, as contained in the book, were then introduced and read to the jury, showing the expectation of life at the age of forty-one years, as stated by the witness.

The defendant objected to the testimony of the witness and the introduction of the Carlisle Tables; the witness had not shown himself qualified as an expert on the subject so as to be competent to testify as such.

The Carlisle Tables, being standard tables on that subject, however, were competent, according to the holding of this court in the case of *Bowman v. Woods*, 1 G. Greene, 441, where the case of *Collin v. Simpson*, 1 Car. & P. 73, holding otherwise, was considered, and the doctrine as recognized in 2 Beck's Medical Jurisprudence, page 666, preferred. The error in admitting the testimony of the witness was error without prejudice, as its exclusion could not alter the case: *Johnson v. Hudson River R. R. Co.*, 6 Duer, 633-648; S. C., 20 N. Y. 65 [75 Am. Dec. 375], affirmed.

There were seven instructions given by the court, as asked by defendant; two asked were modified and given, and nineteen were refused. Several of those refused were, in substance, the same as those given by the court on its own motion. Our approval of the action of the court in refusing the others, as well as giving those excepted to, is based upon grounds already sufficiently set forth in this opinion.

Affirmed.

CIVIL ACTION CANNOT BE MAINTAINED AT COMMON LAW AGAINST ONE FOR CAUSING ANOTHER'S DEATH: *Connecticut etc. Ins. Co. v. New York etc. R. R.*, 65 Am. Dec. 571, and cases in the note thereto; *Long v. Morrison*, 77 Id. 72; *Emmert v. Grill*, 39 Iowa, 692, citing the principal case.

MASTER IS LIABLE FOR TORTS OF SERVANT DONE WITHIN SCOPE OF HIS EMPLOYMENT: *Hagan v. Providence etc. R. R.*, 62 Am. Dec. 377; *Moir v. Hopkins*, 63 Id. 312, and the notes thereto; *Thames Steamboat Co. v. Housatonic R. R.*, 63 Id. 154; *McGuire v. Grant*, 67 Id. 49; *Galena etc. R. R. v. Rae*, 68 Id. 574; *Clark v. Fry*, 72 Id. 590; *City of Detroit v. Corey*, 80 Id. 78; *Korah v. City of Ottawa*, 83 Id. 255; *Andrus v. Howard*, 84 Id. 680; and compare *Coa v. Keahy*, 76 Id. 325; *Hagerstown Bank v. Adams Express Co.*, 84 Id. 499; but see *James v. San Francisco*, 65 Id. 526. The principal case is cited to this point in *Yates v. Squires*, 19 Iowa, 28. As to an employer's liability for the acts or omissions of an independent contractor or his servants, see *City of Detroit v. Corey*, 80 Id. 78, and the cases in the note thereto; *Gardner v. Smith*, 74 Id. 722; *Scammon v. City of Chicago*, 79 Id. 334.

CORPORATION IS LIABLE FOR WRONGFUL ACTS OF SERVANTS DONE WITHIN SCOPE OF THEIR EMPLOYMENT: *Jones v. Western Vermont R. R.*, 62 Am. Dec. 206; *Black v. Carrollton R. R.*, 63 Id. 586; *Moore v. Fitchburg R. R.*, 64 Id.

83, and the notes to these cases; *Gillmoater v. Madison etc. R. R.*, 61 Id. 101; *Mad River etc. R. R. v. Barber*, 67 Id. 312; *Henderson v. San Antonio etc. R. R.*, 67 Id. 675; *Tineman v. Belvidere Delaware R. R.*, 69 Id. 565; *Hopkins v. Atlantic etc. R. R.*, 72 Id. 287; *Main v. North Eastern R. R.*, 75 Id. 725, and note; *New York etc. Tel. Co. v. Dryburg*, 78 Id. 338; *Pennsylvania R. R. v. Vandiver*, 82 Id. 520. As to whether corporations are indictable, see *State v. Great Works etc. Co.*, 37 Id. 38; *Louisville etc. R. R. v. State*, 75 Id. 778.

MASTER'S LIABILITY FOR INJURIES TO SERVANT THROUGH NEGLIGENCE OF FELLOW-SERVANT: See *Fox v. Sandford*, 67 Am. Dec. 587, and note; *Mad River etc. R. R. v. Barber*, 67 Id. 312; *Cayzer v. Taylor*, 69 Id. 317; *Illinois etc. R. R. v. Cox*, 71 Id. 298; *Ohio etc. R. R. v. Tindall*, 74 Id. 259; *Smith v. New York etc. R. R.*, 75 Id. 305; *Washburn v. Nashville etc. R. R.*, 75 Id. 784; *Cooper v. Mullins*, 76 Id. 638; *Nashville etc. R. R. v. Elliott*, 78 Id. 506; *Frazier v. Pennsylvania R. R.*, 80 Id. 467; *O'Connell v. Baltimore etc. R. R.*, 83 Id. 549; *Thayer v. St. Louis etc. R. R.*, 85 Id. 409; *Snow v. Housatonic R. R.*, 85 Id. 720.

FELLOW-SERVANTS, WHO ARE: See *Fox v. Sandford*, 67 Am. Dec. 587, and note; *Mad River etc. R. R. v. Barber*, 67 Id. 312; *Ohio etc. R. R. v. Tindall*, 74 Id. 259; *Frazier v. Pennsylvania R. R.*, 80 Id. 467.

CONTRIBUTORY NEGLIGENCE AS DEFEATING RECOVERY: See *Chapman v. New Haven R. R.*, 75 Am. Dec. 344, and note; *East Tennessee etc. R. R. v. St. John*, 73 Id. 149; *Gawett v. Manchester etc. R. R.*, 77 Id. 422; *Chicago etc. R. R. v. Dewey*, 79 Id. 374; *McCully v. Clarke*, 80 Id. 584. A party cannot recover for injuries caused by the negligence of another when his own negligence was the proximate cause of the injury: *Spencer v. Illinois Central R. R.*, 29 Iowa, 58; *Artz v. Chicago etc. R. R.*, 38 Id. 297; *Sherman v. Western Stage Co.*, 24 Id. 559, all citing the principal case. But the negligence of the plaintiff must contribute proximately to the injury to defeat the recovery: *Adams v. Wiggins Ferry Co.*, 72 Am. Dec. 247, and the cases in the note thereto; *Isbell v. New York etc. R. R.*, 71 Id. 78; *Chicago etc. R'y v. Goss*, 84 Id. 755.

PLAINTIFF, WHETHER MUST SHOW WANT OF CONTRIBUTORY NEGLIGENCE: See note to *Farish v. Reigle*, 62 Am. Dec. 686; *Lucas v. New Bedford etc. R. R.*, 66 Id. 406; *Johnson v. Hudson River R. R.*, 75 Id. 375, and note; *Gahagan v. Boston etc. R. R.*, 79 Id. 724; *Warren v. Fitchburg R. R.*, 85 Id. 700. The principal case is cited to the affirmative of this question in *Carlin v. Chicago etc. R. R.*, 37 Iowa, 322; *Patterson v. B. & M. R. R.*, 38 Id. 280; *Murphy v. Chicago etc. R. R.*, 45 Id. 664; and it is referred to in *Wright v. Illinois etc. Tel. Co.*, 20 Id. 215; *Sherman v. Western Stage Co.*, 24 Id. 565, as quoting the rule to the same effect, laid down in *Scott v. Dublin etc. R'y*, 11 I. R. C. L. 377.

MEASURE OF DAMAGES FOR CAUSING DEATH OF PERSON: See note to *Carey v. Berkshire R. R.*, 48 Am. Dec. 637; *Chicago v. Major*, 68 Id. 553, and note; *Ohio etc. R. R. v. Tindall*, 74 Id. 259. In the case of one who has passed his majority, the damages sustained by his death are such as result to his estate, and an estimate of which may be based upon evidence of his age, occupation, health, habits, etc.: *Walters v. Chicago etc. R. R.*, 36 Iowa, 460; it is therefore proper to show his expectancy of life, as thereon may be based an estimate of the damage to the estate: 36 Id. 461; but compensation for the pecuniary loss to the decedent's estate is alone allowed, and there is no basis for damages for the pain and suffering, or for the grief of his relatives: *Rose v. Des Moines Valley R. R.*, 39 Id. 255; and see *Muldoney v. Illinois Central R'y*, 36 Id. 468; *Coates v. Burlington etc. R'y*, 62 Id. 494. The principal case is cited to these propositions.

EXPERTS, WHO ARE COMPETENT TO TESTIFY AN: See *Hammond v. Woodman*, 66 Am. Dec. 219, and note; *State v. Brown*, 70 Id. 168; *City Council of Montgomery v. Gilmer*, 70 Id. 562; *Chicago etc. R. R. v. George*, 71 Id. 239; *Jones v. Finch*, 75 Id. 73; *New Orleans etc. R. R. v. Allbritton*, 75 Id. 98; *Marcy v. Barnes*, 77 Id. 405; *Flint v. Flint*, 83 Id. 615; *Emerson v. Lowell Gas Light Co.*, 83 Id. 621.

MEDICAL AND SCIENTIFIC WORKS AS EVIDENCE: See *Ashworth v. Kittridge*, 59 Am. Dec. 178, and note discussing the question; *Melvin v. Basley*, 62 Id. 171; *State v. Brown*, 70 Id. 168.

THE PRINCIPAL CASE IS CITED IN *Philo v. Illinois Central R. R.*, 33 Iowa, 49, to the point that where an employee of a railroad company is injured in consequence of the negligence of a co-employee, the company will be regarded as "the perpetrator" of the act, within the meaning of section 4111 of the Revision; it is explained in *Sherman v. Western Stage Co.*, 24 Id. 551, to the effect that the "wrongful act" spoken of by the foregoing section is used to express the same idea as the "wrongful act, neglect, or default" of other statutes; it is referred to in *Greenleaf v. Illinois Central R. R.*, 29 Id. 40, on the question when negligence is a question of law for the court; and it is cited in *Murphy v. Chicago etc. R. R.*, 38 Id. 546, *per* Beck, J., dissenting, to the point that a license to use the track of a railroad by pedestrians may be inferred from acquiescence in the use, with the knowledge of the company; and in *Todd v. Branner*, 30 Id. 440, and *Snyder v. Eldridge*, 31 Id. 130, to the point that where the evidence is conflicting, the supreme court will rarely disturb a verdict on the ground that it is not warranted by the evidence; and it is further referred to in *McNichols v. Wilson*, 42 Id. 392, and *Meadows v. Hawkeye Ins. Co.*, 67 Id. 60, on the point that the court, in the exercise of discretion, may permit a party to introduce evidence omitted by inadvertence, mistake, or ignorance, after he has rested his case.

STATE v. CARRON.

[18 IOWA, 372.]

UNMARRIED FEMALE MAY REFORM AND GAIN CHARACTER FOR CHASTITY, within the meaning of section 4209 of the Iowa Revision of 1860, making the seduction of a female of "previously chaste character" a crime, where she has become unchaste by sexual intercourse.

QUESTION OF PREVIOUSLY CHASTE CHARACTER OF PROSECUTRIX IS ONE OF FACT FOR JURY, in a criminal prosecution for seduction.

INDICTMENT for seduction. The defendant was tried and convicted, and appeals. The facts are stated in the opinion.

J. C. and B. J. Hall, for the appellant.

C. C. Nourse, attorney-general, for the state.

By Court, COLE, J. The evidence, which is before us, discloses the following facts in substance. The defendant was a school-teacher, and boarded in the family of the father of the girl upon whom the offense is charged to have been committed.

At the time defendant became a member of the family, which was in July, 1857, the girl was not quite eight years old,—her eighth birthday occurring in the September following. She attended his school, and in a short time an intimacy existed between them, which soon resulted in unlawful commerce. Such intimacy and commerce continued for several years, the defendant still remaining in the family, and she his pupil, until the fall of 1862, when he left and was absent eight or nine months in the United States naval service, and then returned to the family.

During the intimacy from 1857 to 1862, she appeared, to her parents and others, to manifest much regard for defendant, and to be greatly under his control. He made her frequent presents during that time, and secured her submission to his wishes, at times, by threats to take the presents from her in case she refused. While the defendant was absent she conducted herself with the utmost propriety, and never had the attention of any other person than defendant. After his return, by promise of marriage, etc., he secured a renewal of the unlawful commerce, which produced pregnancy before the girl was fourteen. A short time before the birth of the child the defendant left, and did not return until forced to do so by legal process under this prosecution. This is, of course, a very condensed statement of the evidence.

The counsel for defendant, not controverting the fact of seduction, claims that the offense was complete at the time of the first sexual intercourse, and that a prosecution therefor is barred by the statute. And further, that any subsequent seduction of the same victim could not be within the statute, because she could not be "of previously chaste character": Revision, sec. 4209; Code of 1851, sec. 2586.

It is claimed, on the part of the state, that, although she may have had sexual intercourse with the defendant before he left for the naval service, yet if she had reformed and was chaste in fact at the time of the seduction after his return, such latter offense was within the statute.

The district court adopted the latter view, and gave a series of instructions consistent therewith, the first of which was as follows: "If the jury believe, from all the evidence, that when defendant returned from Port Royal the prosecutrix was a girl of chaste character, and that defendant, by virtue of an engagement of marriage, and through any influence and control he had unduly acquired over her, succeeded in overcoming her

virtue, and had illicit sexual intercourse with her, and got her with child, then he is guilty of seduction at that time, even though he had some years previous had similar connection with her."

The district court refused instructions asked upon the basis of defendant's theory of the law, the fifth and sixth of which were as follows: "5th. If the jury find, from the evidence, that the defendant had carnal knowledge of the prosecuting witness on divers occasions prior to a time which is eighteen months distant (excluding the time defendant was absent from the state) from the date of the presentment of this indictment, then they should acquit the defendant, notwithstanding the defendant may have had sexual intercourse with her during the eighteen months.

"6th. It is not possible that a woman over ten years of age, and of ordinary understanding, who submits in the ordinary manner to the lascivious embraces of a man, can be of chaste character, within the meaning of this indictment."

Very many other instructions were asked by the defendant, embodying the same principle as the above, which were either refused absolutely or so modified as not to be inconsistent with the first instructions given as above.

As an original question, and having in view the well-accepted meaning of the word "chaste," the writer of this opinion would have little or no difficulty in accepting the theory of the defense as the true and correct one. Webster defines "chaste" as meaning: "1. Pure from all unlawful commerce of sexes; applied to persons before marriage, it signifies pure from all sexual commerce, undefiled; applied to married persons true to the marriage bed; 2. Free from obscenity; 3. In language, pure, genuine, uncorrupt," etc. Chaste, then, according to Webster, as applied to the prosecuting witness, means free from all sexual commerce.

Such, however, does not appear to be, under the authorities, the legal significance of the word "chaste," as used in statutes defining the crime of seduction. In the case of *Andre v. State*, 5 Iowa, 389 [68 Am. Dec. 708], it was held by this court, that in order to establish the unchaste character of an unmarried female it is not necessary to prove that she has been guilty of sexual intercourse; and that the term "chaste character," as used in our statute, was used as signifying what the person really is in distinction from that which she may be reported to be: *Carpenter v. People*, 8 Barb. 603; *Boak v. State*, 5 Iowa, 430.

It is laid down by Mr. Bishop, in his most excellent commentaries on criminal law, vol. 2, sec. 1019, that "the meaning of the term 'previous chaste character' is, that she shall possess actual personal virtue, in distinction from a good reputation. But though she has fallen, yet, if at the time of the seduction she is reformed, her case is within the statute." The same view was taken in *Carpenter v. People*, *supra*; also in *Commonwealth v. McCarty*, 4 Pa. L. J. 136; *Denslow v. Van Horn*, 16 Iowa, 476; *Smith v. Milburn*, 17 Id. 30.

In the report of the revisers of the Pennsylvania statutes, the revisers say: "To constitute the penal offense of seduction under the act of April 11, 1843 (the words of which were 'any female of good repute'), there must be illicit connection, and the female must be drawn aside from the paths of virtue, which she was honestly pursuing at the time the defendant approached her; but a single error on the part of the female will not place her beyond the protection of the act, if she has repented her error and is walking in the path of virtue, and enjoying the esteem of her acquaintances when she is led astray": 2 Wharton's Am. Crim. Law, secs. 2672, 2673, and notes. The case of *Safford v. People*, 1 Park. Cr. 474, is not inconsistent with this view. In that case the evidence distinctly negatived the idea of reformation.

The question of previously chaste character by the prosecutrix is one of fact, essential to be shown in order to make out the offense, and is one of the facts to be determined by the jury. Whether the woman has not such previously chaste character, although she has never had sexual intercourse with a man or its counterpart,—whether she has such previously chaste character, although she has had such intercourse and reformed, are questions of fact, to be submitted to and decided by the jury.

In this case there was evidence submitted to the jury, without objection, tending to show the previous sexual intercourse by the prosecutrix with the defendant, and also evidence tending to show her reformation, and the court having properly instructed the jury as to the law of the case, with their finding, which is not clearly against the evidence, we must be content.

There is still another view of the case which might lead to an affirmance of the judgment below. We do no more than suggest it, since we are agreed in placing our judgment on the ground already stated. It is this: The prosecutrix was of

such tender age up to the time the limitation would not bar as to be incapable of consenting to a marriage (Revision, sec. 2516), and incapable of that unchaste mind and heart which would defeat the action. At all events, she was chaste as to all the world except defendant.

Affirmed.

SEDUCTION AS CRIMINAL OFFENSE—GENERAL NATURE.—Seduction as a criminal offense is of statutory origin, and is not punishable at the common law: *Dasty's Crim. Law*, sec. 135 b; *Anderson v. Commonwealth*, 5 Rand. 627. The statutes, however, vary so much in their language that it is impossible to give a uniform definition, and any discussion will be necessarily confined to an examination of the different statutory elements. The English statutes 4 & 5 Phil. & M., c. 8, sec. 2, 9 Geo. IV., c. 31, sec. 20, 24 & 25 Vict., c. 100, sec. 55, are not statutes against seduction as that term is technically used in the American penal laws, but concern the taking, conveying, and enticing away of females from persons having charge of them; nor does section 266 of the California Penal Code, which speaks of a person who "inveigles or entices any unmarried female" away, for purposes of prostitution, or to have "illicit, carnal connection" with men, cover the technical offense of seduction: *People v. Rodriguez*, 49 Cal. 9.

As generally understood, seduction is the use of some influence, art, promise, or deception by a man by which he induces a woman to surrender her chastity: *State v. Bierce*, 27 Conn. 319; *Oroghan v. State*, 22 Wis. 444; *People v. Clark*, 33 Mich. 112; S. C., 1 Am. Crim. Rep. 660; *State v. Fitzgerald*, 63 Iowa, 268; *People v. Royal*, 53 Cal. 62; and a conviction for seduction cannot, consequently, be sustained where the evidence fails to show that any artifice, promise, or deception was used by the defendant: *State v. Crawford*, 34 Iowa, 40. If the intercourse be accomplished by force, or without the consent of the woman, the crime is plainly not seduction, but rape: *State v. Kingsley*, 39 Id. 439; *State v. Lewis*, 48 Id. 578; S. C., 30 Am. Rep. 407; *Oroghan v. State*, *supra*; *People v. Royal*, *supra*. And mere illicit intercourse is not seduction: *Safford v. People*, 1 Park. Cr. 474; *People v. Clark*, *supra*; *State v. Fitzgerald*, *supra*; although a promise of marriage be made: *People v. Clark*, *supra*. But "the exact amount or what kind of seductive arts is necessary to establish the offense charged cannot be defined. Every case must depend upon its own peculiar circumstances, together with the condition in life, advantages, age, and intelligence of the parties": *State v. Higdon*, 32 Iowa, 262. To accomplish sexual intercourse with a virtuous woman, pending an engagement to marry her, may be seduction "by persuasion and promise of marriage," as that phrase is used in a statute, although consent be obtained without other persuasion than that in proposing the intercourse and repeating the promise of marriage: *Wilson v. State*, 58 Ga. 323. The use of seductive arts sufficiently appears where the defendant promised to marry the prosecutrix, and assured her that the act would not be wrong, in view of the fact that they were soon to be married: *State v. Heatherton*, 60 Iowa, 175.

It is competent for the jury to consider what was the defendant's conduct towards the prosecutrix subsequent as well as prior to, and at the time of, the alleged seduction, in determining whether her consent was gained by the employment of seductive means: *State v. Curran*, 51 Id. 112; S. C., 3 Am. Crim. Rep. 405; and evidence of the conduct and appearance of the par-

ties on the day following the alleged offense is relevant on this question: *Levie v. People*, 37 Mich. 518; S. C., 2 Am. Crim. Rep. 75; and where the prosecutrix testified that the defendant told her that certain other girls allowed such liberties, it is proper to ask her their names, as evidence bearing on the means used in effecting the seduction: *Id.*; but in *Wilson v. State*, 73 Ala. 527, it was held not permissible for the prosecutrix to testify that she did not willingly yield to the embraces of the defendant, or that she yielded in consequence of a promise of marriage, or of any act or declaration of the defendant, that being a matter of inference to be drawn by the jury from facts and circumstances proved or presumed, and not a fact to which a witness may testify; but see *Kenyon v. People*, 26 N. Y. 203; S. C., 84 Am. Dec. 177; *Armstrong v. People*, 70 N. Y. 38. Evidence of a conspiracy between the prosecutrix and her parents to inveigle the defendant into a marriage with the prosecutrix, and failing in that, to prosecute him, is admissible: *People v. Clark*, 33 Mich. 112; S. C., 1 Am. Crim. Rep. 660. But evidence tending to show that the prosecutrix, after the arrest of the defendant, offered to compromise the matter, is inadmissible: *State v. Deitrick*, 51 Iowa, 467; nor can it be shown, on behalf of the state, that when the defendant was accused of the crime, he sought an adjustment with the prosecutrix, where the fact of the accusation rested in mere hearsay, and the proposition for an adjustment did not embrace an admission or confession of guilt: *Wilson v. State*, 73 Ala. 527.

CHASTITY OF WOMAN. — The chastity of the woman at the time of the offense is necessarily involved: *People v. Clark*, 33 Mich. 112, 118; S. C., 1 Am. Crim. Rep. 660; *Wilson v. State*, 73 Ala. 533. Under most of the statutes, "previous chaste character" in the person alleged to have been seduced is necessary. And such "previous chaste character," or whatever may be the statutory prerequisite in this regard, must be averred in the indictment as a qualification of the prosecutrix: 2 Wharton's Crim. Law, sec. 1757; *State v. Gates*, 27 Minn. 52; *State v. Stogdell*, 13 Ind. 565. "Character" in such statutes is uniformly held to mean actual personal virtue, and not reputation: 2 Wharton's Crim. Law, sec. 1757; Bishop on Stat. Crimes, sec. 639; Desty's Crim. Law, sec. 135 b; *Andre v. State*, 5 Iowa, 389; S. C., 68 Am. Dec. 708; *State v. Shean*, 32 Iowa, 88, 92; *State v. Brasfield*, 81 Mo. 158; S. C., 51 Am. Rep. 235; *Kenyon v. People*, 26 N. Y. 203, 254; S. C., 84 Am. Dec. 177; *Cook v. People*, 2 Thomp. & C. 404, 406; *Crosier v. People*, 1 Park. Cr. 453; and see *Carpenter v. People*, 8 Barb. 603; *Kauffman v. People*, 11 Hun, 82; and although a statute does not use the word "character," it is held that a previous chaste character is plainly implied: *Polk v. State*, 48 Ark. 482; S. C., 48 Am. Rep. 17.

Chaste character will be presumed, and the burden is on the defendant to impeach it, notwithstanding the presumption of innocence in his favor: *Wilson v. State*, 73 Ala. 527; *Polk v. State*, 40 Ark. 482; *Wood v. State*, 48 Ga. 192, 287, 299; *Andre v. State*, 5 Iowa, 389; S. C., 68 Am. Dec. 708; *State v. Sutherland*, 30 Iowa, 570; *State v. Shean*, 32 Id. 88, 91; *State v. Higdon*, 32 Id. 262; *State v. Curran*, 51 Id. 112; S. C., 3 Am. Crim. Rep. 405; *People v. Brewer*, 27 Mich. 134; S. C., 2 Green's Crim. Rep. 562; *People v. Clark*, 33 Mich. 112, 118; S. C., 1 Am. Crim. Rep. 660; *Crosier v. People*, 1 Park. Cr. 453; *contra*, *West v. State*, 1 Wis. 209; and see *Kauffman v. People*, 11 Hun, 82. The defendant may overcome the presumption by evidence of specific acts of lewdness with others occurring prior to the alleged offense: *Crosier v. People*, 1 Park. Cr. 453; *People v. McArdle*, 5 Id. 180; *Polk v. State*, 40 Ark. 482; S. C., 48 Am. Rep. 17; *People v. Clark*, 33 Mich. 112; S. C., 1 Am. Crim. Rep. 660; and see *People v. Brewer*, 27 Mich. 134; S. C., 2 Green's Cr. Rep. 562; and only by such evidence. Evi-

dance of the woman's general reputation for want of chastity is inadmissible: *Kenyon v. People*, 26 N. Y. 203, 254; S. C., 84 Am. Dec. 177; *State v. Priker*, 49 Iowa, 531; S. C., 31 Am. Rep. 155; *contra*, *Safford v. People*, 1 Park. Cr. 474, *per* Hand, J.; and see *State v. Clark*, 9 Or. 466. But a witness, asked if he had ever had sexual intercourse with the prosecutrix, may decline to answer, on the ground that it might tend to criminate him; *People v. Brewer*, 27 Mich. 134; S. C., 2 Green's Crim. Rep. 562. If, however, the statute should use the word "repute" instead of "character," evidence of the woman's general reputation, and not of specific acts of lewdness, would be admissible: *Bowers v. State*, 29 Ohio St. 542; S. C., 2 Am. Crim. Rep. 592; *State v. Brassfield*, 81 Mo. 151; S. C., 51 Am. Rep. 234; and under such statutes there is no presumption in favor of the prosecutrix, but the state must prove her good repute affirmatively: *Zabriske v. State*, 43 N. J. L. 640; S. C., 39 Am. Rep. 610; *Oliver v. Commonwealth*, 101 Pa. St. 215; S. C., 47 Am. Rep. 704.

If the character of the prosecutrix be impeached by evidence of specific acts of lewdness, the state may rebut this evidence, not only by direct evidence to the contrary, but by any facts or circumstances which render it impossible, incredible, or improbable that she had been guilty of the acts charged: *State v. Shean*, 32 Iowa, 88; and evidence of her good reputation for chastity is therefore admissible, notwithstanding evidence of reputation is inadmissible to show her character for unchastity: *Id.*; *State v. Priker*, 49 Id. 531; S. C., 31 Am. Rep. 155. A witness who resides in the same neighborhood with the prosecutrix, and who has known her from childhood, is a competent witness to testify as to her general reputation: *State v. Deitrick*, 51 Iowa, 467.

It is not necessary to prove that the woman has been guilty of previous sexual intercourse in order to establish that she is not of chaste character. It is sufficient to show that she has been guilty of obscenity of language, indecency of conduct, and undue familiarity with men: *Andre v. State*, 5 Iowa, 389; S. C., 68 Am. Dec. 708; *Boak v. State*, 5 Iowa, 430; *State v. Sutherland*, 30 Id. 570, 572. A woman "is not a virtuous woman whose heart is already lascivious, whose mind is corrupted and defiled by lustful desires and unchaste wishes": *Wood v. State*, 48 Ga. 192, 288, *per* McCay, J.; but see *per contra*, p. 299, *Trippe*, J. But it is not competent to show, in order to establish the unchastity of the prosecuting witness, that she had, on a particular occasion, acted in such a manner as to be reproved by her step-mother: *State v. Curran*, 51 Iowa, 112; S. C., 3 Am. Crim. Rep. 406. While unchaste character may be inferred from other matters than wantonness and indiscretion in conduct, an instruction limiting the attention of the jury to these things is not erroneous in the absence of other evidence: *State v. Bell*, 49 Iowa, 440.

"The word 'previous' must be understood to mean immediately previous, or to refer to a period terminating immediately previous to the commencement of the guilty conduct of the defendant": *Carpenter v. People*, 8 Barb. 603; and consequently, when the statute uses the term "previous chaste character," any inquiry into the chastity of the prosecutrix must be strictly limited to the time prior to the alleged seduction: *State v. Deitrick*, 51 Iowa, 467. All evidence of improper conduct, or acts of illicit intercourse by the prosecutrix subsequent to the offense complained of, is inadmissible: *State v. Wells*, 48 Id. 671; *Mann v. State*, 34 Ga. 1, 5; *People v. Clark*, 33 Mich. 112; S. C., 1 Am. Crim. Rep. 660; *State v. Brassfield*, 81 Mo. 151; *Boyes v. People*, 65 N. Y. 644.

A woman who is unchaste, it is well settled in accordance with the principal case, may reform, and gain a character for chastity within the meaning of the statute: *Wilson v. State*, 73 Ala. 527, 533; *Wood v. State*, 48 Ga. 192, 290; *State v. Dunn*, 53 Iowa, 528, 527; *People v. Clark*, 33 Mich. 112, 118; S. C., 1 Am. Crim. Rep. 660; *State v. Timmens*, 4 Minn. 325; *State v. Brasfield*, 81 Mo. 151, 161; and see *Carpenter v. People*, 8 Barb. 603. Evidence of improper conduct of the prosecutrix eight years before the trial, when she was but fourteen years of age, is therefore inadmissible: *State v. Dunn*, *supra*. But where it appears that illicit intercourse was had between the parties as opportunity offered, at short intervals, to warrant a conviction for the second, third, or latter act, there should be clear and satisfactory proof by the prosecution of reformation: *People v. Clark*, 33 Mich. 112; S. C., 1 Am. Crim. Rep. 660; *People v. Squires*, 49 Mich. 487. A presumption in favor of reformation would not arise in such a case, although it might arise if a reasonable time elapsed between the different acts: *Id.*

It is for the jury to determine whether or not, under the facts shown, the woman is of chaste character: *Andre v. State*, 5 Iowa, 389; S. C., 68 Am. Dec. 708, 711; *Mann v. State*, 34 Ga. 1, 5. A reasonable doubt as to her chastity is held fatal to a conviction: *Wilson v. State*, 73 Ala. 527; but see *State v. Wells*, 48 Iowa, 671. An instruction that if, prior to the alleged seduction, the prosecutrix was guilty of unchaste conduct with a person other than the defendant, this fact should be considered against her, is erroneous, in not going far enough, — the jury should have been told that such unchaste conduct would entitle the defendant to an acquittal: *State v. Carr*, 60 Id. 453.

PROMISE OF MARRIAGE. — The statutes generally require the seduction to be accomplished under a promise of marriage. And when required, the promise of marriage, and the reliance of the woman on the promise, in yielding herself to the man, are essential: *Cole v. State*, 40 Tex. 147; *People v. Clark*, 33 Mich. 112; S. C., 1 Am. Crim. Rep. 660. The promise should unquestionably be averred in the indictment: *Crosier v. People*, 1 Park. Cr. 453. It is no defense that the seduction was accomplished by a promise of marriage, which the defendant honestly and sincerely made and intended to perform, if he did not keep his promise: *State v. Bierce*, 27 Conn. 319. If the woman willingly submits to sexual intercourse, the mere fact that a promise was made at the time will not make the act seduction: *People v. Clark*, 33 Mich. 112; S. C., 1 Am. Crim. Rep. 660. The fact that the promise was made some time prior to the illicit intercourse will not take the case out of the statute: *Armstrong v. People*, 70 N. Y. 38. It is not necessary that the promise should either be made or formally renewed at the time of the seduction: *State v. Brasfield*, 81 Mo. 151.

The promise need not be technically valid: *Kenyon v. People*, 26 N. Y. 203; S. C., 84 Am. Dec. 177; *Crosier v. People*, 1 Park. Cr. 453. "There is nothing in the statute that requires the promise of marriage to be free from all legal objections, viewed as the foundation of an action for its breach": *Callahan v. State*, 63 Ind. 198; S. C., 30 Am. Rep. 211; 3 Am. Crim. Rep. 399. The parties, therefore, need not be of sufficient age to be capable of contracting marriage: *Polk v. State*, 40 Ark. 482; *Kenyon v. People*, *supra*. And the promise may be conditional on the woman's consent to the intercourse: *Kenyon v. People*, *supra*; *Boyce v. People*, 55 N. Y. 644; *Crosier v. People*, *supra*; *Phillips v. State*, 9 N. E. Rep. 345 (Ind.); but see *Wood v. State*, 48 Ga. 192; S. C., 15 Am. Rep. 664, 665; or conditional, it is even held, on the woman's becoming pregnant from the intercourse: *People v. Hustis*, 32 Hun, 58; and see *Armstrong v. People*, 70 N. Y. 38; although it seems such latter promise

would not be void, because the parties are not *in pari delicto*: *Callahan v. State*, 63 Ind. 198; S. C., 3 Am. Crim. Rep. 399. Seduction may also be accomplished by a married man, under a promise of marriage, if the woman did not know him to be married at the time: *Crozier v. People*, 1 Park. Cr. 453, 455; *State v. Grooms*, 10 Iowa, 308, 314; but not if the woman knew him to be married: *People v. Alger*, 1 Park. Cr. 333; *Callahan v. State*, 63 Ind. 198; S. C., 30 Am. Rep. 211; 3 Am. Crim. Rep. 399; *Wood v. State*, 48 Ga. 192; S. C., 15 Am. Rep. 664; although it seems a married man, known by the woman to be such, may be prosecuted for seduction, where the statute reads "by persuasion and promise of marriage, or by other false and fraudulent means," if the intercourse be accomplished "by other false and fraudulent means": *Wood v. State*, *supra*.

The evident design of the laws on this subject is to protect virtuous unmarried females, although possibly the statutes in a few states might be broad enough to include married women seduced by other means than promises of marriage, if such a thing be possible as the seduction of a woman who is married. Some of the statutes expressly use the word "unmarried," and where that is the case, the indictment should allege that the woman was unmarried at the time of the commission of the offense: *Mesa v. State*, 17 Tex. App. 395. The evidence should therefore show that the woman was unmarried at the time of her seduction: *State v. Carr*, 60 Iowa, 453; *State v. Heatherton*, 60 Id. 175; and see *Kenyon v. People*, 26 N. Y. 203; S. C., 84 Am. Dec. 177; but it is held that where the prosecutrix was a girl thirteen years of age, the omission of direct proof that she was not married, the question not being raised, is unimportant, since at that age she could not lawfully be married: *Levis v. People*, 37 Mich. 518; S. C., 2 Am. Crim. Rep. 75.

Evidence that the defendant and the prosecutrix had sexual intercourse with each other prior to the alleged promise of marriage may be given by the defendant to show that the offense was not accomplished under a promise: *Bowers v. State*, 29 Ohio St. 542; S. C., 2 Am. Crim. Rep. 592; *State v. Brassfeld*, 81 Mo. 151. Under a statute which, instead of speaking of seducing "any woman of previous chaste character," uses the words "any unmarried woman," any act of carnal intercourse to which the consent of the prosecutrix was obtained by a promise of marriage at the time constitutes seduction, although there were previous acts of intercourse between the parties, induced by a like promise: *People v. Millsbaugh*, 11 Mich. 278.

The marriage of the parties subsequent to the seduction, although followed by the desertion of the husband, is a defense: *Commonwealth v. Eichar*, 4 Pa. L. J. 326. But it is no defense that after the act the defendant refused to perform his promise because of the woman's subsequent improper and indiscreet conduct, although such fact might be considered by the court in affixing the punishment: *State v. Bierce*, 27 Conn. 319. Evidence on the part of the people that the defendant, after the seduction, refused to marry the prosecutrix is immaterial: *Cook v. People*, 2 Thomp. & C. 404.

The question whether or not the seduction was accomplished under a promise of marriage is one of fact for the jury: *Mann v. State*, 34 Ga. 1, 5.

PREGNANCY is not usually made essential to the consummation of the offense: *Boyce v. People*, 55 N. Y. 644, 646; *Cook v. People*, 2 Thomp. & C. 404; but it is expressly required by the New Jersey statute: See *Zabriskie v. State*, 43 N. J. L. 640; S. C., 39 Am. Rep. 610.

EVIDENCE. — Certain incidental questions of evidence have already been considered, but one matter requires a separate examination. It has been the general policy of the legislation on this subject to permit the prosecutrix to

testify, but to require her testimony to be corroborated, in order to a conviction. In some states it is held that corroboration is not required upon every material fact alleged; but that it is sufficient if the supporting evidence extends to the promise and the intercourse: *Kenyon v. People*, 26 N. Y. 203; S. C., 84 Am. Dec. 177; *Armstrong v. People*, 70 N. Y. 38; see *Polk v. State*, 40 Ark. 482; while in other states every material fact must be corroborated: *Andre v. State*, 5 Iowa, 389; S. C., 68 Am. Dec. 708; *State v. Kingsley*, 39 Iowa, 439; *State v. Timmens*, 4 Minn. 325; but section 1912 of the Revised Statutes of Missouri only requires corroboration as to the promise of marriage: *State v. Brasfield*, 81 Mo. 151; and the statute in Pennsylvania is to the same effect: *Rice v. Commonwealth*, 100 Pa. St. 28. "The supporting evidence need be such only as the character of the matters admits of being furnished": *Armstrong v. People*, 70 N. Y. 38. Direct or positive proof is not demanded: *Boyce v. People*, 55 Id. 644. Sexual intercourse, for instance, necessarily can rarely be proved by other evidence than circumstantial, and this is sufficient: *Boyce v. People*, *supra*; *Polk v. State*, 40 Ark. 482. In Alabama the rule is, that the corroborating evidence is sufficient if it extends to a material fact, and satisfies the jury that the prosecutrix is worthy of credit: *Wilson v. State*, 73 Ala. 527; *Cunningham v. State*, 73 Id. 51. In New Jersey the statute requires that "the evidence of the female must be corroborated to the extent required in case of indictment for perjury": *Zabriske v. State*, 43 N. J. L. 640; S. C., 39 Am. Rep. 610.

The following are illustrations: The evidence of the prosecutrix must be corroborated by facts tending to connect the defendant with the offense: *State v. Crawford*, 34 Iowa, 40; *State v. Wells*, 48 Id. 671; *State v. Painter*, 50 Id. 317; but the fact that the defendant was the suitor of the prosecutrix, proven otherwise than by her testimony, tends to corroborate her testimony that the seduction was accomplished by him: *State v. Curran*, 51 Id. 112; S. C., 3 Am. Crim. Rep. 405; although mere proof that the defendant had opportunity to have sexual intercourse, or employ seductive arts, does not constitute corroborative evidence of such fact: *State v. Painter*, 50 Iowa, 317; *State v. Smith*, 54 Id. 743; *State v. Arah*, 55 Id. 258. The defendant's confession that he had sexual intercourse with the prosecutrix, taken with other evidence, was held to be sufficient corroborative evidence, in *State v. Fitzgerald*, 63 Id. 268. The fact that the prosecutrix had given birth to a child is evidence of sexual intercourse, which is a material ingredient of the offense, although it does not tend to connect the defendant with the crime: *Cunningham v. State*, 73 Ala. 51. An infant three months old, alleged to be the fruit of the seduction, it was held, could not be offered in evidence to corroborate the prosecutrix, by reason of a supposed resemblance between the child and the defendant: *State v. Danforth*, 48 Iowa, 43; S. C., 30 Am. Rep. 387. In *State v. Brasfield*, 81 Mo. 151, evidence as to the paternity of the child was decided to be immaterial. The possession of a wedding ring is not of itself corroboration of a promise of marriage: *Commonwealth v. Walton*, 2 Brewst. 487. See also the following cases as showing what is satisfactory corroborating evidence: *State v. Shean*, 32 Iowa, 88; *State v. Wells*, 48 Id. 671; *State v. Heatherton*, 60 Id. 175; *State v. Timmens*, 4 Minn. 325; *Rice v. Commonwealth*, 100 Pa. St. 28; S. C., 102 Id. 408; S. C., 4 Am. Crim. Rep. 562.

The court must determine the competency of the evidence offered as corroborative, but the jury is to determine its weight and credibility: *State v. Bell*, 49 Iowa, 440; *Crandall v. People*, 2 Lans. 309.

There should be no strained construction put on the testimony of the prosecutrix in order to sustain a conviction of guilt, since it is natural that she

should, as far as possible, shield herself and cast the blame on the defendant: *State v. Haven*, 43 Iowa, 181; S. C., 2 Am. Crim. Rep. 594; but it is held not to be error to refuse to give an instruction cautioning the jury against putting such a construction on her testimony: *State v. Curran*, 51 Iowa, 112; S. C., 3 Am. Crim. Rep. 405.

The guilt of the accused should be established beyond a reasonable doubt: *State v. Kingsley*, 39 Iowa, 439, 440; *State v. Curran*, 51 Id. 112, 119; S. C., 3 Am. Crim. Rep. 405.

INDICTMENT. — The necessity of averments in the indictment showing the woman to be unmarried, her previous chaste character, and the promise of marriage, is considered *supra*; and we now speak of certain special matters. Seduction, being a statutory offense, may be charged in the indictment or information in the words of the statute: *Wilson v. State*, 73 Ala. 527; *State v. Bierce*, 27 Conn. 319; *State v. Curran*, 51 Iowa, 112; S. C., 3 Am. Crim. Rep. 405; an information which avers that the defendant "seduced" the person named is therefore sufficient: *State v. Bierce*, *supra*; as is an indictment charging that the defendant "unlawfully and feloniously did seduce, carnally know, and debauch": *State v. Curran*, *supra*; *State v. Conkright*, 58 Iowa, 338; without stating the facts constituting the crime. An indictment charging that the seduction was "by means of a promise of marriage," instead of using the words of the statute, "under a promise," is good: *Stinehouse v. State*, 47 Ind. 17; *Callahan v. State*, 63 Id. 198; S. C., 30 Am. Rep. 211; 3 Am. Crim. Rep. 399.

The precise time at which the offense was accomplished need not be alleged: *State v. Deitrick*, 51 Iowa, 467; *State v. Brassfield*, 81 Mo. 151.

If but one offense is charged in several counts of an indictment, the denial of a motion to compel the prosecution to elect on which count they rely is not error: *Armstrong v. People*, 70 N. Y. 38; and the same is true if the indictment charges two offenses: *Cook v. People*, 2 Thomp. & C. 404. The introduction of evidence on one offense is a sufficient election: *People v. Clark*, 83 Mich. 112; S. C., 1 Am. Crim. Rep. 660; and will preclude evidence from being offered on another offense: *People v. Clark*, *supra*; *Cook v. People*, *supra*.

An information for seduction may properly contain a count for fornication and bastardy: *Nicholson v. Commonwealth*, 91 Pa. St. 390; and under an indictment for seduction, the defendant may be convicted of adultery or fornication, as the case may be: *Wood v. State*, 48 Ga. 192; *Hopper v. State*, 54 Id. 389; *Dinkley v. Commonwealth*, 17 Pa. St. 126.

STEIN v. CHAMBLESS.

[18 IOWA, 474.]

ASSIGNMENT BY EXECUTION DEFENDANT OF RIGHT TO REDEEM CONVEYS UPON ASSIGNEE NO HIGHER RIGHT than the assignor himself possessed, and a redemption by such assignee leaves the property subject to be taken in satisfaction of any subsisting lien thereon, to the same extent that it might be taken if in the hands of the execution defendant.

EXECUTION SALE IS IRREGULAR, BUT NOT VOID, where an execution was levied upon property and the sale made under an *alias* instead of a *venditioni exponas*.

EXECUTION SALE MAY BE COMPLETED AFTER RETURN DAY, where the execution is levied before its expiration.

ACTION of right by Stein against Chamblless and Banford. In February, 1858, two judgments were recovered against Banford, one by Dougherty, the other by Lemp and Sells, under which the land in question belonging to Banford was sold at sheriff's sale, to Dougherty on December 21, 1861, and to Lemp and Sells on May 8, 1862, each purchaser receiving a sheriff's certificate. On November 12, 1862, Lemp and Sells redeemed the land from the sale to Dougherty, and took an assignment of Dougherty's certificate of purchase. In September, 1860, the plaintiff also obtained a judgment against Banford, under which the land in controversy was sold to him at sheriff's sale, on December 14, 1861. The execution on this judgment was issued September 21, 1861, levied on November 14th following, and expired on December 1st thereafter. It was returned, an *alias* execution issued, and the sheriff returned that he had sold the property under both executions. On December 15, 1862, the sheriff executed a deed of the land to the plaintiff, which was recorded. On December 2, 1862, Banford assigned to Chamblless his right to redeem the land from the sales to Dougherty and Lemp and Sells, and Chamblless accordingly redeemed and received the sheriff's deeds January 3 and May 22, 1863. There was a judgment for the plaintiff, and the defendants appealed.

D. C. Cloud, for the appellants.

Richman and Carskadden, for the appellee.

By Court, LOWE, J. The purchase by Chamblless of Banford's right to redeem the property from the sales to Dougherty, and to Lemp and Sells, conferred upon him no other or better right than Banford himself possessed, and the legal effect of a redemption by him is the same as if Banford himself had redeemed, leaving the property subject to be taken in satisfaction of any subsisting lien or judgment thereon: *Crosby v. Elkader Lodge No. 72*, 16 Iowa, 399; *Curtis v. Millard*, 14 Id. 128 [81 Am. Dec. 460].

It follows, therefore, that the conveyance by the sheriff to Chamblless, under the sales named, was irregular and wholly ineffectual to render nugatory the plaintiff's judgment lien, and the sale under it to him. This, as a proposition of law, does not seem to be controverted by counsel for appellants. But the chief ground of complaint is, that in the sale under the plaintiff's judgment an irregularity intervened, rendering the same effectual to pass the title of the property to him; namely, that there was a levy upon the property by one exe-

cution, and a sale under said levy by or in virtue of an *alias* instead of a *venditioni exponas*. Regularly, under the directions of the statute, the sale should have been made under this last writ, instead of an *alias* execution; but because it was not it does not follow that the sale was void and ineffectual to pass the title to the purchaser, for the reason that the power of the sheriff to sell under the first execution was not, and had not been, exhausted at the time of the sale; and for this very sufficient reason perhaps was that the officer made his return to the effect that he had sold the property under both executions aforesaid. At all events, it has long and often been settled by the courts that if the officer levies before the expiration of the execution, he may complete the sale as well after as before the return day of the writ: *Phillips v. Dana*, 3 Scam. 551; *Wood v. Colvin*, 5 Hill, 281.

The issuing, therefore, of the second writ under the circumstances stated in this case neither added any new power to the sheriff, nor did it have the effect to annul that which he possessed under the first writ; and inasmuch as it affirmatively appears from his return that he both levied and sold under the first execution, it would be going far to hold that this act of supererogation, in placing an *alias* writ in the hands of a sheriff, had the effect legally to vitiate the transaction. To so hold would not quadrate very well with the policy of the law in upholding judicial sales, which this court has so fully recognized and laid down in the cases of *Hopping v. Burnam*, 2 G. Greene, 39; *Shaffer v. Bolander*, 4 Id. 201; *Burton v. Emerson*, 4 Id. 393.

In the case before us, the judgment, levy, and deed are confessedly unobjectionable. Where this is so, under the authorities just referred to, and which but reflect the doctrine of a large class of decisions, other omissions or irregularities in a sheriff's sale will not affect the right or title of an innocent purchaser.

Affirmed.

REDEMPTION BY ASSIGNEE OF EXECUTION DEFENDANT LEAVES PROPERTY TO BE TAKEN in satisfaction of any subsisting lien or judgment thereon: *Curtis v. Millard*, 81 Am. Dec. 460, and note.

SALE UNDER EXECUTION AFTER ITS EXPIRATION IS NOT INVALID if the levy was made before that time: *Childs v. McChesney*, 20 Iowa, 438; *Butterfield v. Walsh*, 21 Id. 101; *Thorington v. Allen*, 21 Id. 292; *Moomey v. Mass*, 22 Id. 386; *Wright v. Howell*, 35 Id. 295; *Walton v. Wray*, 54 Id. 533; *Oss v. Currier*, 62 Id. 555; and see *Cauthorn v. Indianapolis etc. R. R.*, 58 Ind. 16, all citing the principal case. See further on this point the note to *Young v. Smith*, 76 Am. Dec. 83, discussing the subject.

KRAUT v. CRAWFORD.

[18 Iowa, 542.]

PATENTEE OF FRACTIONAL TRACT OF GOVERNMENT LAND, BOUNDED UPON NAVIGABLE STREAM, TAKES TO WATER'S EDGE. The meander line is not a line of boundary.

ACCRETION BETWEEN MEANDER LINE AND WATER'S EDGE ON NAVIGABLE STREAM BELONGS to the owner of the adjoining land.

TRESPASS *quare clausum fregit*. The facts are stated in the opinion.

Murdock and Hunt, for the appellant.

Noble and Beckwith, for the appellee.

By Court, DILLON, J. The district court not having made any finding of facts, the record presents but one question which is properly the subject of review in this court. That question is, Was the judgment of the court below against the weight of evidence, and so against it as to require us to reverse it and order a new trial? In other words, we are called upon to decide whether the court erred in refusing to sustain the plaintiff's motion for a new trial, this motion being based alone upon the ground that the judgment appealed from was contrary to the evidence.

The *locus in quo*, to which both parties claim adverse titles, is in fractional section 17, township 93, range 2. The evidence, all of which is before us, shows that on the twenty-fifth day of January, A. D. 1855, the plaintiff obtained a deed for the above fractional section, or a portion thereof, containing, according to that deed, two and sixty-seven hundredths acres, from the county judge of Clayton County, it being sold and conveyed to the plaintiff as part of "the swamp and overflowed lands situate in and belonging to said county."

If the land in question was swamp-land, and as such had passed to the county, it is clear that this deed vested the plaintiff with the title which the county previously had, and he should have recovered.

But the defendant denies that it was swamp-land; that the county ever had any title to it, or ever conveyed, or could convey, title to the plaintiff; and he furthermore claims that he, and not the plaintiff, is the owner of the *locus in quo*.

It was shown on the trial that the defendant owns the east fractional half of the southwest quarter, section 17, township 93, range 2, he claiming and using the particular tract in dispute for several years.

It is proper here to state that the case is not presented in the evidence with that degree of fullness and precision that is desirable. The plats are not clear, especially when compared with each other. What is all-important, we have not in the record before us,—the field notes of the United States survey. We are not sure that we have even a plat of that survey. Among other plats is one which may or not be the map or plat of the original survey. No explanation is given, and assuming it to be the plat, it is so marked and worn that it is possible that it may mislead us. Under these circumstances, we have had to grope for the facts, and it is no fault of ours, if we have not correctly apprehended them.

The defendant claims the fractional eighty above named (east fractional half of the southwest quarter of section 17, township 93, range 2), and owned by him, embraces the *locus in quo*. This eighty borders on the Mississippi River, and is made fractional by it, and is divided by the government survey into lot 3, containing 31.95 acres, and lot 4, containing 34.40 acres. The *locus in quo* is connected with, and wholly, or almost wholly, opposite lot 4, and lies between the meander line and the river. "It is a low bottom, which at high water is overflowed, but at low water is dry. Owing to a depression in the ridge, a rise of five feet from low-water stage will create a current over the low ground. This low ground has been raised from twelve to eighteen inches by deposits of dirt and accretions since I first knew it": Peck's evidence. This overflowed land, according to McClelland's plat, which is doubtless mainly correct, now contains 8.60 acres, 4.54 acres being south of the slough, and 4.04 acres north of it, and with no slough or current of the river shown as running between it and the water of the main stream. Among other matters left indefinite or uncertain is the exact *locus in quo*. But the plaintiff testifies that "there had been cut by Crawford a small quantity of wood and trees on the premises claimed by the plaintiff, north of the slough, and east of or in front of Crawford's land."

Taking this to be the *locus in quo*, it is not divided from Crawford's other land by any slough or channel or current of the river, but is a low bottom directly connecting the other land with the river, and subject to overflow in high water.

Upon the whole evidence as it is now before us, we are of the opinion that in selling the fractional eighty above named, the government intended to sell all the land to the river; who-

ever bought it became a riparian proprietor on the river. At the time of the survey by the United States, which might have been in a high stage of water, there was not enough land to make a full eighty or a full forty acre tract. For it has been the settled policy of Congress to survey the public lands in square figures, and to extend the subdivisions authorized by law as far as possible in square figures to the lowest denomination: *Brown v. Clements*, 3 How. 663. And see act of Congress directing boundary lines to be extended "to the watercourse," Act of February 11, 1805, 2 Stats. at Large, sec. 2, p. 313; Act 1796, 1 Id. 464.

We can see no reason why the government should wish to reserve a few acres of overflowed lands, and no evidence that they did so reserve it. The case at bar bears a very striking resemblance to that of *Middleton v. Pritchard*, 3 Scam. 510 [38 Am. Dec. 112], where it was decided that the riparian proprietor owned the low ground or peninsular outside of the meander line, and which very nearly corresponds in character to the tract in dispute in this case. The court placed their decisions upon the ground that such proprietor owned to the center thread of the current.

In *McManus v. Carmichael*, 3 Iowa, 1, this court adopted a different rule as to the extent of riparian proprietorships on the Mississippi. To the decision of the present case, it is not necessary to determine which is the better or correct rule.

As we understand the testimony, the government plat of the survey referred to in the patent represented the fractional eighty, now owned by the defendant, and which, we hold, embraces the *locus in quo* as bounded upon the river. It showed no intermediate tract between that and the river. There was no such tract reserved. The plaintiff's theory seems to be that defendant is only entitled to the quantity of land called for in the patent and shown on the plat; that the grant is limited to the meandered line. This is an error. The grantee gets all down to the river, be it more or less. The line is meandered chiefly to obtain the quantity; and the meander line is not a line of boundary. As above remarked, the government plat shows defendant's land to abut upon and to be made fractional by the watercourse; and a grant of it by the government will at least extend to the water, so as to give the grantee, under all circumstances, the full benefit of the river front. Once a riparian proprietor, always so; because accretions, or newly formed ground, belong to such proprietor,

jure gentium, and because the government cannot afterward grant such accretions, or newly formed ground, to another. The law is wise and just. If the action of the river had gradually worn away the defendant's land after the purchase from the United States, the loss would have been his.

To compensate him for risk of loss in this manner, as well as to preserve to him the benefits of his water-front, the law gives him (see authorities below cited) the advantage of any gain by accretions or alluvial deposits. If the *locus in quo* was in existence when the land was surveyed and sold by the United States, it not being reserved, and the official plat showing the tract now owned by the defendant to extend to the river, no right to or over any of the ground could subsequently be sold by the government, nor acquired by the plaintiff, not even though the *locus in quo* be situated between the river and the meandered line of the original survey.

If, on the other hand, the *locus in quo* has been gradually formed since the survey and sale, this addition or increment belongs to the defendant by virtue of the principle that ground gained by alluvion belongs to the owner of the adjoining land: Consult, on the above propositions, Coop. Just. 74; Inst. 1, 2, 28; Puff. 4, 7, 12; Bract., b. 2, c. 2; De Jure Maris, c. 6; Angell on Watercourses, secs. 53, 54, 55; 3 Kent's Com. 519; *King v. Yarborough*, 3 Barn. & C. 91; *New Orleans v. United States*, 10 Pet. 662; *Deerfield v. Pliny Arms*, 17 Pick. 41 [28 Am. Dec. 276]; 2 Public Land Opin. and Inst. 758, 850; *Ex parte Jennings*, 6 Cow. 518 [16 Am. Dec. 447], note, and cases. And as to riparian rights, see also *Grant v. City of Davenport*, 18 Iowa, 178; *Lorman v. Benson*, 8 Mich. 18 [77 Am. Dec. 435] (1866); *Prosser v. Wapello County*, 18 Iowa, 327; *Prosser v. Davis*, 18 Id. 367; and recent case of *Jones v. Soulard*, 24 How. 41 (1860), in which it is even held that riparian proprietors upon the Mississippi River are entitled to all accretions as far out as the middle of the stream; *Lamb v. Rickets*, 11 Ohio, 311, 313.

Finally, the points decided by the court in this case are:

1. That the plaintiff, having proved no actual possession of the ground in controversy, could not recover on that ground;
2. The plaintiff did not establish a satisfactory legal title, for whether the defendant, under *McManus v. Carmichael*, 3 Iowa, 1, had or had not title to the *locus in quo* (assuming it to be below high-water mark), we are of opinion that the government having sold the land to the defendant, referring to a plat which bounded the land by and upon the river, cannot, by any sub-

sequent action or grant to another, cut off the defendant's right to the full benefit of his river front, or deprive him of any of the incidents of riparian proprietorships, and this although the land thus subsequently granted was afterward newly formed or elevated above the river by alluvion, and lies outside of the meander line and between it and the present edge of the water.

Affirmed.

DEED BOUNDED ON NAVIGABLE STREAM, WHAT CONVEYS: See *Middleton v. Pritchard*, 38 Am. Dec. 112; *Jones v. Janney*, 42 Id. 309; *Pike v. Monroe*, 58 Id. 751.

ACCRETION BELONGS TO OWNER OF ADJOINING LAND: *Spigener v. Cooner*, 64 Am. Dec. 755, and note.

THE PRINCIPAL CASE IS CITED IN *Musser v. Hershey*, 42 Iowa, 364, to the point that meander lines are run, not as boundary lines, but for the purpose of defining the sinuosities of the banks of the stream, and as a means of ascertaining the quantity of land in the fractional tract subject to sale; and it is referred to in *Boytan v. Miller*, 22 Id. 582, on the question of ownership of lands on a slough.

YATES v. SQUIRES.

[19 IOWA, 26.]

MASTER IS LIABLE FOR TORTS OF HIS SERVANT DONE IN COURSE OF HIS EMPLOYMENT, though done without his authority, or even against his express directions.

RESPONSIBILITY OF MASTER FOR TORTS OF SERVANT GROWS OUT OF, is measured by, and begins and ends with, his control of the servant; hence he is not liable for an act committed after the service is ended, no matter how soon after it is committed.

ACTION by Yates against John A. Squires and his son, Thomas Squires, for the value of a mare alleged to have been killed by the wrongful act of the son under the command of his father. Verdict was rendered against John A. Squires alone, and he appeals. The opinion states the case.

W. G. Hammond, for the appellant.

C. R. Scott, for the appellee.

By Court, COLE, J. The plaintiff and defendant owned lands adjoining, which were inclosed in common, there being no partition fence; their horses had been accustomed to run in the common inclosure. On the day the mare was killed, the defendant, on leaving home, directed his son Thomas to turn the plaintiff's mare out of the lot inclosed in common, if

she got in there, which was all the direction he gave him in the matter. The mare, being found in the inclosure, was turned out into the road by the son. After she had been out about fifteen minutes, two of the plaintiff's little boys were endeavoring to drive her past the house of defendant towards their home, and his son Thomas stood in the road to prevent them from doing so; and as the mare came up to go past, he struck her with his whip, whereupon the mare jumped upon the fence and was injured, from which injury she died that evening. The defendant did not return home or have any knowledge of the accident until after it occurred. The plaintiff also proved the value of the mare. This is, in substance, all the evidence. The jury found for plaintiff the value of the mare, and the defendant moved for a new trial, on the ground that the verdict was not sustained by sufficient evidence. The court overruled the motion, and rendered judgment on the verdict, which is the only error complained of.

It is not claimed on the part of plaintiff that the defendant is liable by reason of the relation of parent and child, nor could it be. But his liability is sought to be placed on the relation of master and servant, growing out of the express authority or command to turn the animal out of the common inclosure. A master is liable for the torts of his servant, done in the course of his employment, although they are done without his authority, or even against his express directions: Story on Agency, secs. 452-456, and authorities cited; 1 Parsons on Contracts, 87, and notes and cases cited; *Donaldson v. Mississippi and Missouri R. R. Co.*, 18 Iowa, 280.

But this responsibility of the master grows out of, is measured by, and begins and ends with his control of the servant: 1 Parsons on Contracts, 88, and note a, b. The application of these elementary rules to the case at bar will enable us to determine as to the correctness of the ruling of the court below.

The master directed the servant to turn the mare out of the pasture. If, in the execution of this order, the servant had done the wrong which produced the damage, the liability of the master would be unquestioned. But after the servant had fully discharged this duty, and the control of the master, in that service, was ended, he committed the wrong complained of. The fact that the wrongful act was done shortly after the performance of the other act which he was directed to do cannot change the liability of the master. If that ser-

vice was ended, it is immaterial whether it had been ended fifteen minutes or fifteen days. The act, in either case, not being done in the service of the master, he is not liable for it.

The evidence shows that the service under the direction of the defendant was ended, and that the wrongful act was done outside of the master's service. And hence the court erred in refusing to set aside the verdict and grant a new trial.

Reversed.

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- MASTER IS RESPONSIBLE FOR TORTS OF SERVANT COMMITTED IN HIS SERVICE: *Andrus v. Howard*, 84 Am. Dec. 680, and note; even though the act be willful: *Hagerstown v. Adams Express Co.*, 84 Id. 499; *Korah v. City of Ottawa*, 83 Id. 255; *Pennsylvania R. R. Co. v. Vandiver*, 82 Id. 520, and note 526; but see *Cox v. Keahey*, 76 Id. 325; but the rule of *respondet superior* ceases when the relation of superior and subordinate ceases: *Clark v. Fry*, 72 Id. 590, and note 599; the rule being that the master's responsibility for the torts of his servant grows out of, is measured by, and begins and ends with his control over the acts of the servant: *McGuire v. Grant*, 67 Id. 49, and note 60; see also the note to *Hagan v. Providence etc. R. R. Co.*, 62 Id. 379-389.
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CROSSEN v. WHITE.

[19 IOWA, 108.]

MORTGAGEE HAS RIGHT TO REDEEM LAND FROM SALE UNDER EXECUTION, though the liability secured by the mortgage is a contingent one which may never ripen into a certainty.

DEFECT IN PETITION WHICH SHOULD BE ASSAILED BY DEMURRER IS CURED BY VERDICT.

OBJECTIONS TO ADMISSION OF EVIDENCE NOT TAKEN IN LOWER COURT cannot be raised on appeal.

ACTION for an alleged breach of contract. It appeared that the defendant, White, recovered a judgment against the plaintiff, Crossen, and one Mooreland for \$1,272 upon a note, of which Mooreland was the maker and Crossen a surety merely. To indemnify Crossen, Mooreland conveyed to him a certain lot of land, and took his bond to reconvey the lot upon being released from liability on the judgment, and Crossen arranged that White should receive the rent of the lot. Afterwards, White had the lot sold under execution, and bought it in at the sale for three hundred dollars. Before the expiration of the time for redemption, Crossen notified White that he was going to redeem the lot, and White thereupon, in consideration that Crossen would not redeem, agreed to sell the lot as soon as he could get a fair price, and to pay Crossen the surplus of

the proceeds over and above the three hundred dollars bid by him for it; and Crossen in consideration of this agreement did not redeem. White sold the lot for seven hundred dollars, but before the sale he had made the balance of his judgment out of Crossen's property. Crossen then demanded of White the excess of four hundred dollars which White had agreed to pay him, and also the rent received by White after the lot was conveyed to Crossen and before its sale under execution to White. White refused to pay these demands, and Crossen then brought this suit. Judgment was rendered for the plaintiff for the excess of four hundred dollars and for the rent demanded. The defendant's motion for a new trial was overruled, and he now appeals.

Z. T. Fisher, for the appellant.

Crookham and Rhinehart, and John R. Barcroft, for the appellee.

By Court, *COLE, J.* The first point made by the appellant is, that the plaintiff Crossen has not shown that he had any such interest in the lot in question, at the time of the alleged agreement with defendant, as would entitle him to redeem. This is based upon the ground that the plaintiff was only a mortgagee, and held the mortgage to secure him against a contingent liability, and had not, at the time of the agreement, been damnified in any manner whatever.

Revision: "Section 3334. Any creditor whose claim becomes a lien prior to the expiration of the time allowed by law for the redemption by creditors may redeem. A mortgagee may thus redeem before or after the debt secured by the mortgage falls due." The plaintiff, being a mortgagee, had the right, under this section of the Revision, to redeem, although the liability secured by the mortgage was a contingent one, and might possibly never ripen into a certainty. The fact that he held a mortgage upon the property, to which he might be compelled ultimately to resort to obtain payment of the liability secured by it is sufficient to entitle him to redeem. It is true, as a general rule, that more or less uncertainty exists in the case of every mortgage, whether the mortgagee will be compelled to resort to the mortgaged property to collect the debt secured by it; for the debtor may pay the debt without such resort. This doubt, however, does not affect the mortgagee's right to redeem, nor does the addition of a still further doubt, as to whether the debt secured will ever become fixed

and certain, defeat that right. It is sufficient if the mortgagee may eventually have to resort to the mortgage security.

It is further claimed by appellant that the plaintiff has not averred in his petition that he was the owner of the lot, or mortgagee, or possessed of any interest therein, and therefore he could not recover under such petition, in any event. If the petition was vulnerable to this objection, it should have been assailed by motion or demurrer; such defect is cured by the verdict: *Cotes v. City of Davenport*, 9 Iowa, 227; *Nollen v. Wisner*, 11 Id. 190.

2. The only other point made by counsel for appellant is, that the parol contract, as alleged in the petition, whereby White agreed to allow plaintiff all he could sell the lot for, over his bid, was an agreement for the transfer of an interest in real property, and is therefore within the statute of frauds and void.

Without stopping now to discuss the question, whether, under our Revision, the position assumed by the appellant is or not, in any case, correct law, we remark that our statute (Revision, sec. 4006) simply provides that "no evidence of such contract shall be competent" unless in writing. In this case, the parol evidence was received without objection, and fully sustains the plaintiff's case. The defendant having failed to object to the testimony at the proper time, or at any time, in the district court, cannot avail himself of any objection to it in this court.

Affirmed.

OBJECTION NOT MADE IN LOWER COURT WILL NOT BE ENTERTAINED ON APPEAL: *Hendrickson v. St. Louis etc. R. R. Co.*, 84 Am. Dec. 76, and note; *Rauole v. Am. M. L. Ins. Co.*, 84 Id. 280. Defective pleading furnishes no ground for error where no advantage is taken of the defect, either by demurrer or by motion in arrest of judgment: *Martin v. Webb*, 39 Id. 363. The principal case is cited to the point that a judgment by default will not be reversed as erroneous on the ground that the petition failed to state a cause of action until a motion to correct the error has been made in the lower court and there overruled: *Webster v. Cedar Rapids and St. Paul R. R. Co.*, 27 Iowa, 318; *Egleston v. Brassfield*, 38 Id. 699.

CLARK v. CITY OF DES MOINES.

[19 IOWA, 199.]

AGENTS, OFFICERS, OR EVEN CITY COUNCIL OF MUNICIPAL CORPORATION cannot bind the corporation when they transcend their lawful powers; and a city warrant is subject to this rule, notwithstanding it is negotiable in form.

EVERY ONE IS CHARGED WITH KNOWLEDGE OF NATURE OF DUTIES AND EXTENT OF POWERS of the officers and legislative body of a municipal corporation, since they are merely the public agents of the corporators, and their duties and powers are prescribed by statute.

MUNICIPAL CORPORATION MAY SET UP PLEA OF ULTRA VIRES or its own want of power under its charter or constituent statute to enter into a given contract or to do a given act in violation or excess of its corporate authority.

NEGOTIABILITY WILL NOT VALIDATE OBLIGATIONS WHICH ARE NOT BINDING because of a want of power to make or issue them.

CITY WARRANTS ARE IN LEGAL EFFECT PROMISSORY NOTES, NOT BILLS OF EXCHANGE.

MUNICIPAL CORPORATIONS HAVE SUCH POWERS ONLY AS ARE EXPRESSLY GRANTED, and such incidental ones as are necessary to make those powers available and essential to effectuate the purposes of the corporation; and their powers are strictly construed.

OFFICERS OF CITY HAVE NO POWER TO ISSUE NEGOTIABLE PAPER for claims and demands against the city when they have no express authority, and the existence of such a power is not necessary, as an incident, to those granted, or to carry out the purposes and objects of the corporation.

BONA FIDE HOLDER OF WARRANTS DRAWN BY OFFICERS OF CITY UPON TREASURY, in taking the warrants, is bound at his peril to ascertain the nature and extent of the power of the officers and the city.

WANT OF CORPORATE POWER OR WANT OF AUTHORITY IN MUNICIPAL OFFICERS cannot be supplied by their unauthorized acts or representations.

CITY WARRANTS ISSUED IN SATISFACTION OF JUDGMENT AGAINST CITY at the rate of one dollar in warrants for every seventy-five cents due on the judgment are usurious.

IT IS DOUBTFUL WHETHER MUNICIPAL CORPORATION IS BOUND BY ACTION OF ITS COUNCIL in agreeing to pay a sum clearly, distinctly, and ascertainably greater than is legally due.

WHERE, UNDER CHARTER OF CITY, CARE OF ROADS AND STREETS IS CORPORATE MATTER, and for road debts city is unconditionally liable as for other debts, this liability cannot be controlled or varied by the form in which the warrants are drawn or worded by the municipal officers; and hence, though the warrants are drawn payable out of a particular road fund, the liability of the city is still general, and not conditioned upon the existence of such funds in the treasury.

MUNICIPAL CORPORATION CANNOT ERECT TOLL-BRIDGE AND LEVY AND COLLECT TOLLS unless authorized by the law of the state.

CITY HAS NO POWER TO ERECT BRIDGE, EITHER BY ITSELF OR JOINTLY WITH INDIVIDUAL, or to aid in its erection by a loan of the corporate credit, under a power in its charter "to improve sidewalks, alleys, and streets," and "to make by-laws necessary and proper for the good regulation, safety, and health of the city."

CITY HAS NO POWER TO LOAN ITS CREDIT OR MAKE ITS ACCOMMODATION PAPER for the benefit of citizens, to enable them to execute private enterprises.

BUILDING OF SIDEWALKS IS LEGITIMATE MUNICIPAL OBJECT under the charter of Des Moines.

WARRANTS ISSUED BY CITY IN CONSIDERATION OF ILLEGAL SCRIP issued previously by the city in payment of *bona fide* debts or in exchange for valid city warrants are valid, and not open to the objection of illegality of consideration.

CITY WARRANTS ARE ADMISSIBLE IN EVIDENCE WITHOUT PROOF OF GENUINENESS OF SIGNATURE or of authority to issue them, in an action upon them against the city, if they are set out in the petition by copy and their execution is not denied under oath.

ACTION upon city warrants or orders. The plaintiff was not the payee of any of them but sued as assignee or holder. Some of the warrants were payable out of the "general fund," and a copy of one of them is as follows: "No. 783. City warrant. \$8.00. Des Moines, Iowa, October 21, 1862. To the Treasurer of the City of Des Moines: Pay U. H. White or bearer eight dollars out of any moneys in the general fund not otherwise appropriated. Thos. Cavanaugh, Mayor. Attest: H. W. King, Recorder." Indorsed, "Presented November 24, 1862. J. E. Hull, City Treasurer." Other of the warrants, in form the same as the above, and payable to M. P. Turner or bearer, "out of any moneys in the West Side road fund not otherwise appropriated." And others were in the same form payable, to different persons or bearer, "out of any moneys in the East Side road fund not otherwise appropriated." Some of the warrants payable out of the general fund were indorsed, "Issued for scrip surrendered, and bearing six per cent interest, from January 17, 1860. H. W. King, Recorder. Presented January 14, 1863. J. E. Hull, City Treasurer." Judgment in the district court was rendered for the plaintiff, partly upon demurrer and partly upon the verdict of a jury. The defendant appeals.

Polk and Hubbell, for the appellant.

Phillips and Phillips, for the appellee.

By Court, DILLON, J. The plaintiff is the assignee of the orders or warrants in the suit. It is not alleged in the answer, nor was it shown on the trial, that he was not a *bona fide* holder of these instruments for value, and without notice of matters now pleaded as defenses thereto. It is claimed by the plaintiff that the warrants being signed by the proper officers of the city, authenticated by its corporate seal, and

negotiable in form, he, as the innocent holder thereof, stands, like a similar holder of ordinary mercantile paper, free from and unaffected by the equities and defenses which the city set up in bar of his recovery.

This view of the law was the one adopted by the court below in its rulings prior to and upon the trial. Thus, after stating the law applicable to the warrants issued for "scrip surrendered,"—as to which more will presently be said,—the court charged the jury as follows: "As to all the other warrants, they are negotiable, and there is no evidence tending to show that they were issued without authority or without consideration; all evidence of this kind having been excluded, because it was not shown or offered to be shown that the plaintiff had knowledge of such defenses; and if you believe from the evidence that the warrants were issued by the defendant, and that plaintiff is the owner thereof, you will find for him as to all such warrants." So the bill of exceptions recites that "the defendant, on the trial, offered to show by the record of the proceedings of the city council, that all of said warrants were issued without any authority from the said city council, and without any vote of said council authorizing the same," but this evidence the court refused to receive, because the warrants were negotiable, and there was no offer to show that the plaintiff took them with notice of such defect or irregularity.

This view of the law is, we think, erroneous. If my name be signed to a promissory note by a person representing himself to be my agent, but "without any authority" from me, I am not bound; and I am no more bound because the obligation has been put in a negotiable form than if it has been put in a form not negotiable.

And the same rule must and does apply to paper purporting to be issued by the agents or officers of public or municipal corporations. The general principle of law is well known and definitely settled, that the agents, officers, or even city council of a municipal corporation, cannot bind the corporation when they transcend their lawful and legitimate powers.

This doctrine rests upon this reasonable ground: The body corporate is constituted of all of the inhabitants within the corporate limits. The inhabitants are the corporators. The officers of the corporation, including the legislative or governing body, are merely the public agents of the corporators. Their duties and their powers are prescribed by statute. Every one, therefore, may know the nature of these duties

and the extent of these powers. These considerations, as well as the dangerous nature of the opposite doctrine, demonstrate the reasonableness and necessity of the rule, that the corporation is bound only when its agents, by whom, from the very necessities of its being, it must act, if it acts at all, keep within the limits of their authority. Not only so, but such a corporation may successfully interpose the plea of *ultra vires*; that is, set up as a defense its own want of power under its charter or constituent statute to enter into a given contract or to do a given act in violation or excess of its corporate power and authority. The cases asserting these principles are numerous and uniform; some of the more important and striking ones need only be cited: *Mayor of Albany v. Cunliff* (city not liable for negligently building bridge under an unconstitutional statute), 2 N. Y. 165 (1849); reversing S. C., 2 Barb. 190; *Cuyler v. Trustees of Rochester* (laying out street contrary to charter), 12 Wend. 165 (1834); *Hodges v. Buffalo* (4th of July appropriation), 2 Denio, 110 (1846); *Halstead v. Mayor*, 3 N. Y. 430 (1850); *Martin v. Mayor*, 1 Hill, 545; *Boone v. Utica*, 2 Barb. 104; *Cornell v. Guilford*, 1 Denio, 510; *Boylard v. Mayor and Aldermen of New York*, 1 Sand. 27 (1847); *Dill v. Wareham*, 7 Met. 438 (1844); *Vincent v. Nantucket*, 12 Cush. 103, 105 (1858), *per* Merrick, J.; *Stetson v. Kempton*, 13 Mass. 272 [7 Am. Dec. 145]; *Parsons v. Inhabitants of Goshen*, 11 Pick. 396; *Wood v. Inhabitants of Lynn*, 1 Allen, 108 (1861); *Spaulding v. Lowell*, 23 Pick. 71; *Mitchell v. Rockland*, 45 Me. 496 (1858); S. C., 41 Id. 363 [66 Am. Dec. 252]; *Anthony v. Adams*, 1 Met. 284 (1840); *Western College v. Cleveland*, 12 Ohio St. 375 (1861); *Commissioners v. Cox*, 6 Ind. 403 (1855); *Inhabitants v. Weir*, 9 Id. 224 (1857); *Smead v. Indianapolis, Pittsburgh, and Cleveland R. R. Co.*, 11 Id. 104 (1858); *Brady v. Mayor*, 20 N. Y. 812; *Appleby v. Mayor etc.*, 15 How. Pr. 428; *Estep v. Keokuk County*, 18 Iowa, 199, and cases cited by Cole, J.; *Clark v. Polk County*, 19 Id. 247.

Negotiability will not validate obligations which are not binding, because of a want of power to issue them: *Gould v. Sterling* (action on loan bonds), 23 N. Y. 464; S. C., 1 Am. Law Reg., N. S., 290; and note of Professor Dwight thereon, a portion of whose remarks are so strikingly in point that we quote them: "It seems entirely clear," he observes (Id. 297), "that no representation by an agent can even establish the fact of agency. If a person, who is not in fact authorized, represents that he has power to execute a promissory note for

another, the instrument, so far as the supposed principal is concerned, is utterly void. The negotiability of the note will have no effect upon the question, as the inquiry turns upon the existence of the note itself. The term "negotiability" presupposes the existence of an instrument made by a person having capacity or power to contract in that particular manner": *Hull v. Marshall Co.*, 12 Iowa, 142, 162, *per* Lowe, J. In *Starin v. Genoa*, 23 N. Y. 452, and *Gould v. Sterling*, 23 Id. 464, the plaintiffs were *bona fide* holders, for value, of negotiable bonds, and the court of appeals of New York held that they were bound to inquire into the power to issue them. "One who takes a negotiable note or bill of exchange purporting to be made by an agent," says Mr. Justice Selden (Id. 464), "is bound to inquire as to the power of the agent." Analyzing in the case at bar the view of the court below, it will be found to involve three several distinct propositions: 1. That the warrants in suit are negotiable paper; 2. That the officers of the city (mayor and recorder), or at all events the city council, has power to create and issue negotiable paper; and 3. That warrants like the ones in question are valid in the hands of an innocent holder, even if issued without authority or without consideration. With reference to this, as well as other portions of the record, it is necessary to examine these propositions.

(a.) The orders in suit are not bills of exchange, as a bill of exchange proper involves the idea of at least two distinct parties, drawer and drawee. The instruments in suit are orders by the city on itself,—mere directions to its treasurer to pay the amount to the bearer. In legal effect they are the promissory notes of the city: *Miller v. Thomson*, 3 Man. & G. 576; followed in *Fairchild v. Ogdensburgh, Clayton, and Rome R. R. Co.*, 15 N. Y. 337 [69 Am. Dec. 606]; *Bull v. Sims*, 23 Id. 570, 572; *Clark v. Polk County*, 19 Iowa, 247. And by usage and statute (Revision, c. 73) they pass by delivery, and the holder, as the real owner, may bring suit upon them in his own name: *Steel v. Davis County*, 2 G. Greene, 469; *Brown v. Johnson County*, 1 Id. 486; *Campbell v. Polk County*, 3 Iowa, 467. The debtor corporation may give a written acknowledgment of the debt. It may make this run to order or bearer without invalidating it; but it does not follow, as we shall show, that there is an implied power to invest these with all the qualities of commercial paper.

(b.) There is further involved, in the view of the district

court, the proposition that it is competent for the city officers (mayor and recorder) to issue its obligations in a negotiable form, and endow them with all of the attributes of negotiable mercantile securities. Upon examining the charter under which these warrants were issued (Laws 1857, c. 185, p. 281), no express power to issue promissory notes or other negotiable paper is conferred. If the power exists to make paper which, in the hands of a *bona fide* holder, cuts off equities, it must be an implied power.

It is a familiar and elementary principle that municipal corporations have and can exercise such powers, and such only, as are expressly granted, and such incidental ones as are necessary to make those powers available and essential to effectuate the purposes of the corporation; and these powers are strictly construed: 2 Kent's Com. 298; *Mayor v. Cunliff*, 2 N. Y. 165, and the authorities cited in connection therewith.

It is held that banking and trading corporations have the implied or incidental power to make negotiable paper: *McCullough v. Moss*, 5 Denio, 567; *Straus v. Eagle Ins. Co.*, 5 Ohio St. 59 (1855); *Mott v. Hicks*, 1 Cow. 513 [13 Am. Dec. 550]; *Attorney-General v. Life and Fire Ins. Co.*, 9 Paige, 470; 2 Kent's Com. 299; 1 Parsons on Notes and Bills, 165. And the same rule has in some cases been applied, without much consideration, by way of analogy, to municipal and public corporations; but not so as to cut off inquiry into the validity of the paper or just defenses: *Kelley v. Mayor etc.*, 4 Hill, 263; see *Chemung Canal Bank v. Supervisors etc.*, 5 Denio, 517; *Came v. Brigham*, 39 Me. 39; *Clarke v. School District*, 3 R. I. 199. To this doctrine, as applied to commercial corporations, we see no objection; but we do see many and serious objections to treating the ordinary warrants of counties and cities as possessing all of the incidents and qualities of commercial paper.

These warrants are unlike bonds issued on time, negotiable in form, and for sale in the market, as, for example, those issued by towns, cities, and counties to railroad companies, under express act of the legislature (for they cannot be issued without express legislative authorization), in payment for stock subscribed. This class of securities are made and issued for the express purpose of raising money by their sale; and the attainment of this object would be embarrassed or defeated if they were subject to equities in the hands of *bona fide* purchasers. They are therefore held to be negotiable, with all the incidents of negotiability: *Clapp v. Cedar County*,

5 Iowa, 15 [68 Am. Dec. 678]; *Morris Canal Co. v. Fisher*, 9 N. J. Eq. 667 [64 Am. Dec. 423] (1855); S. C., 3 Am. Law Reg., O. S., 423; *Gelpecke v. Dubuque*, 1 Wall. 175; *Craig v. Vicksburg*, 31 Miss. 216; *Jackson v. York etc. R. R. Co.*, 48 Me. 147; S. C., 2 Am. Law Reg., N. S., 585; S. C., 2 Id. 748, and note of Judge Redfield; *Chapin v. Vermont and Massachusetts R. R. Co.*, 8 Gray, 575; *Clark v. Janesville*, 10 Wis. 136; *Mad-dox v. Graham*, 2 Met. (Ky.) 56; *Gould v. Sterling*, 23 N. Y. 464; *White v. Vermont and Massachusetts R. R. Co.*, 21 How. 575; 21 Id. 539; *Mechanics' Bank v. New York and New Haven R. R. Co.*, 13 N. Y. 599; S. C., 4 Duer, 480.

But with warrants like those in suit it is entirely different. Under the charter of the city (sec. 18), it is made "the duty of the city council to liquidate and settle all claims and demands against the city." And by the same section it is provided that no money shall be drawn from the city treasury "except by order under the authority of the city council."

The city council audit and allow claims and demands, and their action in this regard is to be entered of record (Charter, sec. 3). Upon a certified copy of these proceedings, the treasurer of the city would be authorized to pay the claimant.

But by usage, or perhaps under a by-law, orders like those before us are drawn upon the treasurer. This mode is adopted for convenience, and these instruments are not to be assimilated, in all respects, to ordinary commercial paper.

On this question the argument may be thus condensed: There is no express authority to the officers of this city to issue negotiable paper which shall be free from equities in the hands of purchasers. And the existence of such a power is not necessary as an incident to those granted, or to carry out the purposes and objects of the corporation, and would be attended with abuse and fraught with danger. It should not, therefore, be held to exist as an implied power: *Smith v. Cheshire*, 13 Gray, 318 (1859); *Inhabitants etc. v. Weir*, 9 Ind. 224 (1857); *Halstead v. Mayor etc.*, 3 N. Y. 430, and other cases cited *supra*. Whether the corporation defendant could specially confer power upon its officers to bind it to negotiable paper which should be free from equities, is a question which the record does not require to be decided.

(c.) It is further involved in the view of the district court, that an innocent holder of one of these warrants may recover thereon, though it be issued without consideration or without authority. The unsoundness of this view we have already

pointed out. The warrants purport to be issued by the agents of the city. The plaintiff, in taking these warrants, was bound, at his peril, to ascertain the nature and extent of the power of these officers and of the city corporation: *Delafield v. State of Illinois*, 2 Hill, 159, 174; S. C., 26 Wend. 192; S. C., 8 Paige, 53; *Hodges v. Buffalo*, 2 Denio, 110; *Supervisors v. Bates*, 17 N. Y. 242; *Overseers v. Overseers of Pharsalia*, 15 Id. 341; *Butterfield v. Inhabitants of Melrose*, 6 Allen, 187; *Rossire v. City of Boston*, 4 Id. 57; *Zabriskie v. Cleveland, Columbus, and Cincinnati R. R. Co.*, 23 How. 381, 398.

By examination he may find that these warrants cannot lawfully be issued without the order of the city counsel. This must be entered of record "on the journals of the city, which shall be open" (so the charter declares) "to the inspection and examination of every citizen." A warrant issued by the mayor and recorder without the previous order of the council is void. They have no authority to do it; it would be substantially a forgery. A purchaser of such a warrant is bound at his peril, at least, to ascertain that the claim upon which it is founded has been liquidated and settled by the council. A representation by municipal officers that this has been done (and the issue of such a warrant is in substance such a representation) will not be binding upon the corporation. Why? The answer is, because an agent can neither create nor enlarge his powers by his unauthorized representations. The law on this subject has of late years been much investigated, and will be found discussed and examined in a most critical, able, and exhaustive manner in the following important cases: *Mechanics' Bank v. New York and New Haven R. R. Co.* (Schuyler Frauds), 13 N. Y. 599 (1856); *Farmers' Bank v. Butchers' and Drovers' Bank* (where teller, without real but with apparent power, certified negotiable check as good), 14 Id. 623; S. C., 16 Id. 125; *Claffin v. Farmers' and Citizens' Bank etc.*, 25 Id. 293; S. C., 2 Am. Law Reg., N. S., 92, and note; *Gould v. Sterling*, 23 N. Y. 464, the two last distinguished from the case in 14 Id. 623; *Griswold v. Havens*, 25 Id. 595 (1862); *Exchange Bank v. Monteath*, 26 Id. 505. Now, without entering into these interesting discussions respecting the liabilities of principals in certain cases for the acts of agents apparently but not really within the scope of their commission, we need only observe that if it be conceded that the mayor and recorder had the apparent power to issue warrants like the ones in suit, still, if they did not really have this authority, their represen-

tations that they possessed it would not be the representations of a fact which from its nature (as in the case of a teller who certified the checks) rested peculiarly within the knowledge of the agent. On the contrary, the charter and the journals of the corporation open to public inspection afford to every person the certain means of ascertaining the existence of the authority of these officers to issue the warrants.

We have been able, after a very thorough investigation, to find no case which holds that city and county warrants like those before us are freed from equities when in the hands of *bona fide* holders. Nor has the plaintiff's counsel called our attention to any such. On the other hand, we have found several cases in different states expressly holding that such orders were not commercial paper in the hands of an innocent holder, so as to exclude evidence of the legality of their issue or preclude defenses thereto: See *Halstead v. Mayor etc. of New York* (on audited city warrants like those in suit), 5 Barb. 218 (1849); S. C. affirmed in court of appeals, but where the rights of a *bona fide* holder were not passed on, 3 N. Y. 430 (1850); *People v. El Dorado County* (on audited county warrants, distinctly holding that *bona fide* holder stood in shoes of payee), 11 Cal. 170 (1858); S. P., *Sturtevant v. Liberty* (town orders), 46 Me. 457; *Smith v. Inhabitants of Cheshire*, 13 Gray, 318 (1859); *Andover v. Grafton* (on note made by town), 7 N. H. 298 (1834); *Sanborn v. Deerfield*, 2 Id. 251, 254; *Dalrymple v. Whittingham*, 28 Vt. 345; *Inhabitants v. Weir*, 9 Ind. 224 (1857); *School District v. Thompson*, 5 Minn. 280 (1861), approving *Halstead v. Mayor etc.*, 5 Barb. 218; *Clark v. Polk County*, 19 Iowa, 247, and cases cited by Cole, J.

It must not be supposed that certain cases recently decided by the supreme court of the United States have escaped attention. These cases were brought upon negotiable county and city bonds, and where there was express power to issue them: *Commissioners of Knox County v. Aspinwall*, 21 How. 539, 544, approved and followed in *Bissell v. Jeffersonville*, 24 Id. 287 (1860), and *Gelpecke v. Dubuque*, 1 Wall. 203.

In the latter case, speaking of the express power of the city of Dubuque to issue the bonds sued on, Judge Swayne, following *Commissioners of Knox County v. Aspinwall*, *supra*, laid down this rule: "When a corporation has power, under any circumstances, to issue negotiable securities, the *bona fide* holder has a right to presume that they were issued under the circumstances which give the requisite authority, and they are

no more liable to be impeached for any infirmity in the hands of such a holder than any commercial paper."

Upon this, without calling in question its correctness in the particular case in which it was used, we remark: 1. That this language was employed in a case where there was express, specific power on the part of the city to issue negotiable bonds, and in that respect is distinguishable from the case before us; 2. Experienced jurists, conscious of difficulty and danger attending it, hesitate to lay down general and unqualified rules professing to embrace all cases. Attempts of this character generally prove unsuccessful. With due deference, the language above quoted is susceptible of being taken to assert a doctrine which, without reasonable limitations, cannot be true as respects public and municipal corporations. Suppose a city charter expressly authorized the common council to issue negotiable securities for corporate debts, and that the mayor and recorder, without an order of the council, fabricate,—manufacture such securities,—and that they find their way into the hands of innocent purchasers. It cannot be that Judge Swayne means that "the *bona fide* holder has a right to presume that they were issued under the circumstances which gave the requisite authority," and yet he says so.

The true rule is, that the want of corporate power, or the want of authority in the municipal officers, cannot be supplied by their unauthorized acts or representations: *Gould v. Town of Sterling*, 23 N. Y. 439; *Treadwell v. Commissioners*, 11 Ohio St. 183, commenting on and criticising *Commissioners of Knox County v. Aspinwall*, 21 How. 539.

Any other doctrine nullifies the limitations and checks contained in the charter for the protection of the corporators, and needlessly invests the public officers and agents with the power successfully to "Schuylerize" our public corporations without limit and without remedy. Whether warrants like those in suit, issued by order of the council, but which order was based upon the allowance of a claim for which the city was not legally liable, would, in the hands of a *bona fide* holder, be free from equities, is a question of great difficulty, and which we pass, because not necessary to be now decided. It will be discussed and decided in some of the authorities before referred to.

2. For answer to the third count in the petition, the city says, "that the warrant therein set out was executed to Keyes and Crawford, the payees thereof, in satisfaction of a judgment

held and owned by them against the city, at the rate of one dollar in warrants for each seventy-five cents due on said judgment; that the city council thereby exceeded their authority, and the said warrant thus issued is illegal, usurious, and void."

To this defense the court sustained the plaintiff's demurrer, and the defendant excepted and abided by his answer. The legal sufficiency of this defense is one of the questions presented in this appeal. For forbearance or "giving day of payment," a creditor, under our statute of usury, cannot lawfully receive or contract to receive more than ten per cent interest.

If I purposely and knowingly give my note for one hundred dollars, payable on demand, in satisfaction of a debt or judgment for only seventy-five dollars, it is *prima facie*, and perhaps conclusively, usurious. And so it is if the same be done by a corporation. Besides, it may well be doubted whether the corporation is bound by the action of its council in agreeing to pay a sum clearly, distinctly, and ascertainably greater than is legally due. Courts hold a stiff rein on corporate allowances; and auditing officers cannot, in general, if ever, allow and pay claims, however meritorious, if they are not legally chargeable: *People v. Stout*, 23 Barb. 349; *People v. Lawrence*, 6 Hill, 244 (1843); S. C., 6 Id. 463; *Chemung Canal Bank v. Supervisors*, 5 Denio, 517, 521 (1848); *Halstead v. Mayor etc.*, 5 Barb. 218; S. C., 3 N. Y. 430; *Lake v. Trustees of Williamsburg*, 4 Denio, 520; *Supervisors v. Briggs*, 2 Id. 26; S. C., 2 Hill, 135; *Augusta v. Leadbetter*, 16 Me. 45; compare *Bean v. Jay*, 23 Id. 117, 121; and see also *Campbell v. Polk Co.*, 8 Iowa, 467.

The defense pleaded was good *pro tanto*, and the demurrer should have been overruled instead of sustained.

3. For answer to various other counts in the petition, the defendant pleads, in substance, that they are drawn "on the West Side road fund, and are to be paid out of funds raised by taxation in the West Side road district, and not out of the general fund of said city"; that there has been and is no money in the treasury belonging to said West Side road fund; that said warrants are improperly joined in this suit with warrants payable out of the general fund, and with those payable out of the East Side road fund. In further defense to certain warrants, the defendant alleges "that they were issued and loaned to M. P. Turner, the payee thereof, by the city

council of Des Moines, to aid him (Turner) in constructing a toll-bridge across the Raccoon River, near its mouth, in the corporate limits of said city; that the city council had no authority (in law) to make such contract with Turner, wherefore said warrants are without consideration and void."

To this defense the plaintiff demurred; the demurrer was sustained, and the defendant excepting, stood upon it. Other questions made on this appeal relate to the sufficiency of these defenses. The same defenses, i. e., improper joinder and want of funds, was pleaded to the warrants drawn upon the East Side road fund, together with the following special defense, viz.: "The said warrants were issued to one George Johnson, under and by virtue of a pretended contract by and between the street committee on the East Side of Des Moines and said Johnson, for building a sidewalk on the East Side, in said city; that the street committee had no authority to make such contract and authorize the building of said walk; that the same was wholly without authority of law and void, and the warrants issued thereunder without consideration and void."

(a.) The plaintiff's demurrer to this answer was sustained, and defendant excepted and refused to answer over. This ruling is also assigned as error.

The questions here made may be considered together. It is claimed by the city that the warrants issued for road purposes are payable out of a "particular fund," and that the obligation to pay depends upon the existence and the sufficiency of the special fund; that being thus payable, they are not negotiable; that the city is only trustee for the East and West Side road funds, and the two classes of warrants cannot be sued upon in one and the same action.

If these warrants are not payable out of a particular fund, or in other words, if the city is liable thereon, irrespective of the fact whether there is or is not a road fund on hand and in the treasury, this disposes of all the claims above stated as being made by the city.

By section 23 of the charter, the "city" (Des Moines) "is hereby constituted a road district." By section 27 it is provided, "that all property and road poll tax due from persons within the corporate limits shall be paid into the city treasury; that there shall be two road districts, East and West Side, a street commissioner in each (appointed by the city council, sec. 4), under whose supervision all moneys collected for street

and road purposes shall be expended; *provided*, all moneys so collected shall be expended in the districts where they are levied or may fall due." Taking all of the provisions of the charter together, it is plain that the care of roads and streets is a corporate matter. The corporation has charge of all streets and roads, and it, and it alone, levies and collects the taxes to defray the expenses of making and keeping them in order. All of these taxes go into its treasury. All charges of this character are payable out of it. While there is to be a street commissioner on each side, he is subject to the control of the council. It is the council that determines the extent of expenditures or indebtedness for road purposes. The effect of the proviso in section 23, *supra*, is simply to prevent the council from expending in the West Side money and taxes collected for road purposes in the East Side, and *vice versa*. It would hence result that a "road account" should be kept by the officers of the city with each side,—each side to be credited with what has been received from it, and debited with what has been paid out on its account. There is nothing in the charter which favors the notion that the liability of the city for road debts is conditioned upon the existence of road funds in the treasury. For road debts the city is as absolutely and unconditionally liable as for other debts. This liability cannot be controlled or varied by the form in which warrants may be drawn or worded by the municipal officers: *County Commissioners v. Cox*, 6 Ind. 403 (1855), and authorities cited *infra*.

We therefore hold that the reference in the orders to the East Side and West Side road funds is not to express the idea that the obligation to pay is dependent upon a fund *in esse*, at the time of demand or suit brought, but to enable the officers of the city to keep the account above suggested. This is a matter which does not concern creditors who look alone to the city. The officers of the city will have no difficulty, after judgment, in ascertaining, by an inspection of the warrants, how much to charge to the East Side and how much to the West Side road account or fund. This view is entirely consistent with all, and is directly sustained by many, of the following authorities: *Kelly v. Mayor etc.*, 4 Hill, 263; *Lake v. Trustees*, 4 Denio, 520 (1847); *Bull v. Sims*, 23 N. Y. 570; *Fairchild v. Ogdensburg, Clayton, and Rome R. R. Co.*, 15 Id. 337 [69 Am. Dec. 606]; *Bank of Kentucky v. Sanders*, 3 A. K. Marsh. 184 [13 Am. Dec. 149]; *Commissioners v. Mason*, 9 Ind. 97; *Bayerque*

v. *San Francisco*, 1 McAll. 175; *Campbell v. Polk Co.*, 3 Iowa, 467; *Pease v. Cornish*, 19 Me. 191; *Edwards on Bills*, 143, distinguishing (which is here applicable) "between bills drawn payable out of a particular fund and those that are simply chargeable to a particular account"; *Chitty on Bills*, 138; *Story on Promissory Notes*, secs. 25, 26.

It is also set up in bar of recovery on certain warrants payable to Turner, that they "were issued and loaned to aid him in constructing a toll-bridge across the Raccoon River in the corporate limits of the city." This is the substance of the answer in this respect. No person or corporation can erect a toll-bridge and levy and collect tolls any more than a person or corporation can set up a ferry and levy and collect ferriage, unless this be authorized by the law of the state: *De Jure Maris*, c. 2, 3, where Sir Mathew Hale says: "No man can take a settled or constant toll, even in his own private land for a common passage without the king's license": 4 Am. Law Reg., N. S., 513, and authorities there cited; *Prosser v. Wapello Co.*, 18 Iowa, 327; *Mullarky v. Cedar Falls*, 19 Id. 21.

How Turner obtained authority to erect a toll-bridge within the corporate limits of the city does not appear. The authority may, as in the Cedar Falls' case, just cited, antedate the corporate organization of the city. Whether under the statute it can be conferred by the county authorities within the limits and upon the streets of the city, we need not stop to inquire. We will assume, on the averments, that Turner had the lawful power to erect the bridge. The city of Des Moines, under its charter, possessed no power to erect such a bridge for itself and by itself: *Mullarky v. Cedar Falls*, *supra*. Nor would it have the power to erect such a bridge jointly with an individual, or to appropriate funds of the city in aid of such a private enterprise.

The power of the city (Charter, sec. 14) "to improve sidewalks, alleys, and streets," "to make by-laws necessary and proper for the good regulation, safety, and health of the city," would not authorize it to erect, or aid in the erection, of a toll-bridge by a loan of the corporate credit.

Turner's bridge was, it would appear, essentially an individual enterprise. Let it be granted that, if erected, the bridge would be of advantage to the city by facilitating the intercourse of citizens residing on different sides of the river. So the erection of an elevator or of a private market-house might be beneficial to the city. But would this justify the city in

issuing its warrants, and loaning them to a private individual, to aid him in erecting the elevator or private market-house? No instance occurs to us in which it would be competent for the city to loan its credit or make its accommodation paper for the benefit of citizens, to enable them to execute private enterprises: 1 Parsons on Notes and Bills, 166; *Smead v. Indianapolis, Pittsburgh, and Cleveland R. R. Co.*, 11 Ind. 105.

To recognize such a right would be to break down, to a great extent, the checks of limitations on the power of the corporation,—checks and limitations designed to protect and secure the inhabitants against the dangers of speculative and extra municipal projects. Though the averments are not very full and specific, the answer sets up that warrants were loaned to Turner to aid him in building a toll-bridge for himself, and this, *prima facie* at least, is in excess of the corporate authority of the city. If the bridge was already erected on one of the streets of the city, if Turner, by law, had the right to exact tolls from the citizens, we will not say that the corporation would not be authorized to make, among other agreements that might be imagined, an arrangement whereby its citizens might pass free from tolls, and issue its warrants in payment for the privileges thus acquired. No such case is presented. We decide only that it cannot loan its credit or paper to aid an individual in constructing a toll-bridge, or to aid any other scheme essentially private. To prevent municipal corporations from engaging in banking and speculative enterprises, it is necessary, as this case shows, and as the current history of these bodies has demonstrated, to keep the corporate wings clipped down to the legal standard. The court erred in sustaining the demurrer to this part of the answer.

(c.) As to the warrants issued to Johnson, different considerations apply. Building sidewalks is, under the charter, a legitimate municipal object. Why the street committee had no authority in law to make such a contract is not alleged. The ruling of the district court on this point is affirmed.

4. Certain of the warrants in suit purport on their face to have been issued "for city scrip surrendered." The city pleaded that the scrip thus surrendered, and which constituted the consideration of these warrants, was issued in violation of article 5 of the old constitution and chapter 147 of the code of 1851,—being intended to circulate as money.

To this the plaintiff responds, in substance, that the scrip itself was issued by the city, and used by it to redeem city

warrants founded upon a valuable consideration. It appeared on the trial, that in 1857 the city council passed an ordinance reciting "the present scarcity of money," "the impossibility of collecting taxes," "the impolicy of paying interest on loans," and the policy of issuing, "for general circulation, convenient warrants," that tax-payers might become enabled to pay their taxes, and providing for the issue of engraved city warrants in denominations of one, two, three, and five dollars. In phraseology the warrants thus issued are like those now in suit. In appearance they are like bank bills, being on bank-note paper, with vignette, etc.

This scrip the treasurer was authorized to receive for taxes and to exchange for outstanding city warrants drawn in the usual form. The evidence does not show that any scrip was issued by the city, except to pay city indebtedness, or in exchange for their outstanding evidences of city debt. The "scrip" was for a time popular, and, as invited by the city, its creditors received it in payment or in exchange for other evidences of municipal liability. Time wore on; the scrip would seem to have declined in popular favor, and not to have realized the high anticipations which its emission had inspired. Empirical, if not illegal, the remedy did not cure or relieve the corporate ills recited in the ordinance to exist. So, in 1860, the council "changed its base." In 1857 it asked warrant-holders to exchange them for scrip. They did so. In 1860 it authorized "the issue of city orders for the redemption of city scrip." Scrip-holders, conforming to the wishes of the city, then surrendered scrip and received warrants, such as those in suit, and such as those which they had given up to the city when they received the scrip.

On this part of the case the court charged that the scrip was illegal, and so far the defendant does not complain; but it further directed the jury, in substance, that if the city owed a valid and admitted debt, paid it in scrip, and then took up the scrip by issuing the warrants in question, the law regards this as a settlement of the transaction, and the warrants would be supported by a sufficient consideration, and be valid and binding. The jury so found the fact to be, and the evidence fully sustains the finding. Under the circumstances this defense is entitled to no favor. Unless corporations are exempt from the ordinary principles of fair dealing that apply between man and man, this defense has no just foundation. It is the duty of courts not to allow the honest and just merits of a cause

to be entangled in the meshes of sophistical reasoning and rules purely technical. Not a member of the city council would, we are persuaded, make such a defense for himself. We have multiplied and constantly recurring examples of the fact that under the shield of their corporate character men daily do acts which they would never do as individuals. Nor are these examples confined to this side of the Atlantic. "It is a familiar fact," says Mr. Herbert Spencer, "that the corporate conscience is ever inferior to the individual conscience; that a body of men will commit, as a joint act, that which every individual of them would shrink from did he feel personally responsible": *Essays*, No. VII., p. 261, Am. ed. 1865; and see *Id.*, Essay V., for description, perhaps too highly colored, of the workings of English reformed municipal corporations.

That the charge of the district court was correct, even conceding the scrip to be illegal, we have no doubt: See *Mullarky v. Cedar Falls*, 19 Iowa, 21; *Alleghany City v. McClinkan*, 14 Pa. 81 (1850); *Early v. Mahon*, 19 Johns. 147 [10 Am. Dec. 204].

5. The warrants being set out in the petition by copy, and not being denied under oath, it was not error for the court to admit them in evidence, without proof of the signature, or of the authority to issue the same. These warrants are in the nature of notes, and are within the provisions of the statute: Acts 1862, c. 28, p. 30. The signatures thereto and seal of the corporation being thus admitted to be genuine, we are of the opinion that it is not necessary, in this state, that the plaintiff shall show, as a condition of being allowed to read the warrants in evidence, that these officers had the authority from the council to sign and issue them. It is not necessary to inquire whether proof *aliunde* of the city treasurer's indorsement of the "presentation" of the warrants is necessary, or whether the indorsement of that fact by the treasurer is an "indorsement thereon," within the meaning of the statute last cited, because the fact of presentation was, by being alleged and not denied, admitted on the record: See, however, *Clark v. Polk County*, 19 Iowa, 247. The ruling of the district court on these points is affirmed.

Because the court below, on the trial, refused to allow the city to show that the warrants, respecting which a jury trial was had, were issued without authority, the judgment of that court on the verdict for \$1,789.30 is reversed, and as to these warrants and the warrants issued to Keyes and Crawford, and issued to Turner, a trial *de novo* is ordered.

The judgment of the district court in the plaintiff's favor, on demurrer, for \$2,632 is affirmed, less the amount of the Keyes and Crawford and Turner warrants. The district court will ascertain the amount thus to be deducted, and credit the same on the judgment for \$2,632, or set it aside and render a new judgment for the sum that remains after making the deduction above directed.

PAPER IN FORM OF BILL OF EXCHANGE, but showing on its face that the drawer and drawee are the same person, may be treated by the holder as a promissory note; and it seems that he may elect to treat it as a bill of exchange, but probably the drawer cannot compel him so to treat it: *Indiana etc. R. R. Co. v. Davis*, 83 Am. Dec. 303, and note 306.

MUNICIPAL CORPORATION CAN EXERCISE ONLY THOSE POWERS EXPRESSLY GRANTED by charter, and such as are necessarily incidental: *Zottman v. San Francisco*, 81 Am. Dec. 96, and note 107. The principal case is cited to the point that a municipal corporation possesses and can exercise the following powers, and none others: 1. Those granted in express words; 2. Those necessarily implied, or necessarily incident to the powers expressly granted; 3. Those absolutely essential to the declared objects and purposes of the corporation, not simply convenient, but indispensable; and any fair doubt as to the existence of a power is resolved by the courts against the corporation and the existence of the power: *Merriam v. Moody's Ex'rs*, 25 Iowa, 170; *Burdick v. Babcock*, 31 Id. 572; *City of Keokuk v. Scroggs*, 39 Id. 450; *Field v. City of Des Moines*, 39 Id. 579. Therefore, without express authority in the charter to do so, municipal corporations have no power to bind themselves by negotiable paper: *Diely v. City of Cedar Falls*, 21 Id. 570. And the power of a city to levy and collect taxes, particularly special assessments, must be plainly given: *McNamara v. Estes*, 22 Id. 254, citing the principal case.

POWERS AND DUTIES OF OFFICERS OF MUNICIPAL CORPORATIONS are given or defined by statute, and one who deals with them is charged with knowledge of the nature and extent of these duties and powers: *Boardman v. Hayne*, 29 Iowa, 343; *Reichard v. Warren County*, 31 Id. 393; *Newman v. Sylvester*, 42 Id. 115, citing the principal case; see also *Petersburg v. Mappin*, 56 Am. Dec. 501. The clerk of the board of supervisors of a city or county has no power to make or issue negotiable county warrants, and such want of authority is conclusively presumed to be known of all men: *Clark v. Polk County*, 19 Iowa, 256, citing the principal case. So the unauthorized representations of an agent, especially a public agent, whose powers and duties are expressly defined by a public statute, touching facts not peculiarly within his own knowledge, but regularly open to both parties, and readily susceptible of ascertainment, are not binding upon his principal or the public: *State v. Haskell*, 20 Id. 281, citing the principal case.

WARRANTS ISSUED BY MUNICIPAL CORPORATION ARE NOT NEGOTIABLE, and in the hands of an assignee are subject to any defense which might be made against the payee: *Clark v. Polk County*, 19 Iowa, 256; *Skiff v. Cross*, 21 Id. 461; *Diely v. City of Cedar Falls*, 21 Id. 570; *Shepherd v. District Township*, 22 Id. 596; *Boardman v. Hayne*, 29 Id. 343; *Iowa Railroad Land Co. v. County of Sac*, 39 Id. 142; *National State Bank v. Ind. Dist. of Marshall*, 39 Id. 496; *Eastman v. District Township*, 40 Id. 439; *Johnson v. People*, 8 Ill. App. 337; *Hubbard v. Town of Lyndon*, 28 Wis. 677; *O'Brien County*

v. *Brown*, 1 Dill, 568; *School District v. Lombard*, 2 Id. 496, citing the principal case; *Keller v. Hicks*, 81 Am. Dec. 78, and note 82.

IMPLIED POWER OF MUNICIPAL CORPORATION TO BORROW MONEY: Note to *Bank of Chillicothe v. Chillicothe*, 30 Am. Dec. 190 et seq.; *Mills v. Gleason*, 78 Id. 721, and note 729. But the legislature cannot authorize taxation in aid of private enterprises or objects; and municipal bonds issued under legislative authority, to be paid by taxation, as a *bonus* or donation to secure the location or aid in the erection of a manufactory or foundry owned by private individuals, are void even in the hands of holders for value: *Commercial Bank v. City of Iola*, 2 Dill. 365, citing the principal case. And it is cited to the same effect in *Hanson v. Vernon*, 27 Iowa, 71.

WHAT CONTRACTS ARE USURIOUS: See note to *Davis v. Garr*, 55 Am. Dec. 391-400. A note and mortgage executed to secure a loan of gold at a higher rate of premium than the market value of the gold are usurious: *Austin v. Walker*, 45 Iowa, 529, citing the principal case.

LIABILITY OF COUNTIES FOR BENEFICIAL USE OF MONEY, labor, or property, though not formally obligated therefor: Note to *Gilman v. Contra Costa County*, 68 Am. Dec. 293.

THE PRINCIPAL CASE IS CITED also to the point that where warrants of a municipal corporation are issued to the payee at the rate of one dollar in warrants for forty cents of actual indebtedness, in a suit upon such warrants judgment may be had for the amount of actual indebtedness represented by the warrants, to wit, forty per cent thereof: *Wormley v. District Township*, 43 Iowa, 686; and to the point that municipal bonds under seal, made payable to bearer, and intended for sale in the public market, are negotiable in as ample and full sense as the circulating medium of the country: *City of Memphis v. Brown*, 1 Flip. 217; and that in an action for the conversion of a bond of a municipal corporation the measure of damages will ordinarily be its market value at the time of the conversion, with interest thereon from that time, and not simply the face or amount of the bond: *Griffith v. Burden*, 35 Iowa, 142.

HARRIS v. RUTLEDGE.

[19 Iowa, 386.]

CONGRESS HAS POWER UNDER NATIONAL CONSTITUTION TO FIX STANDARD OF WEIGHTS AND MEASURES; but this power it has never exercised, and until it does so, the respective states may, for themselves, regulate weights and measures.

STATUTE REGULATING WEIGHTS AND MEASURES BINDS PARTIES TO CONTRACTS, and local customs fixing different weights or measures cannot be set up unless mentioned in the contract.

CONTRACT FOR MASONRY AT SPECIFIED PRICE PER PERCH WILL BE CONSTRUED according to the statute defining the number of cubic feet in a perch, in the absence of any expression to the contrary; no implied contract to the contrary is competent, and if both parties contemplated a perch of a different number of feet, then the contract must be corrected in a court of equity.

ACTION on contract for a balance alleged to be due plaintiff thereunder, and for extra work and materials. Judgment

was entered for the plaintiff, and the defendant appealed. The opinion states the case.

V. Wainwright, for the appellant.

Leonard and Mott, for the appellee.

By Court, DILLON, J. By the written contract, the plaintiff agreed "to build one rock house, sixteen by eighteen feet in the clear, furnishing everything except woodwork, at \$3.50 per perch." When made, this contract was not stamped; but under section 163 of the act of Congress of June 30, 1864 (Stats. at Large, 1863-64, p. 218), it was post-stamped on the trial. It thereby became as valid and binding between the parties as if it had been duly stamped at the time of execution. The contract nowhere specifies the amount or quantity of which "a perch" shall consist. On the trial, the plaintiff claimed that it was the understanding of the parties, though it was not expressed in the contract, that a perch should contain only sixteen and one half cubic feet. He also claimed that such was the general custom among masons, or at least was the local custom of that neighborhood. These claims are controverted by the defendant.

The plaintiff was examined as a witness in his own behalf, and stated *inter alia*: "My understanding was sixteen and one half feet to the perch, and I never supposed the defendant understood it differently."

"Plaintiff's attorney," so continues the bill of exceptions, "then asked the witness if there was a custom among masons as to the number of cubic feet constituting a perch of stone-work. The defendant objected, for the reason that the statute fixes the number of cubic feet in a perch. The objection of the defendant was sustained by the court, for the reason that custom could not be proven to conflict with an express statute; but the court further held that the plaintiff might show an express or an implied contract to count sixteen and one half feet to the perch, or he might show that he, plaintiff, understood that he was working at sixteen and one half feet per perch, and that defendant knew that fact, or had good reason to know it." The plaintiff, against the defendant's objection, was then permitted to testify as follows: "I built a stone smoke-house for the defendant the year previous to the present work, and in estimating the number of perches, I reckoned sixteen and one half feet to the perch. Defendant also took the dimensions of the smoke-house, and said his

estimate agreed with mine, and he paid me for sixteen and one half feet per perch."

The statute (title 13, Regulations Pertaining to Trade, c. 71, Weights and Measures) provides (sec. 1777) that "the 'perch' of mason-work or stone is hereby declared to consist of twenty-five feet cubic measure." It also contains the following general provision (sec. 1778) applicable to the subject in hand: "Contracts in which no other scale or standard is expressed shall be taken to mean the above." See corresponding provision, Blue Book, 1843, p. 655, sec. 7.

The object of a statute is to be considered in giving it a construction. A few considerations will serve to make this object manifest. Under the national constitution (art. 1, sec. 8), Congress has power "to fix the standard of weights and measures." This power it has never exercised. And until it is exercised, the respective states may, for themselves, regulate weights and measures: Rawle on Constitution, c. 9; Story on Constitution, sec. 1122; *Weaver v. Fegely*, 29 Pa. St. 27 [70 Am. Dec. 151] (1857), and authorities there cited.

Experience, in all ages of the world, has shown that this is a proper and even necessary subject of legislative regulation; that in no other way can certainty and uniformity be secured. "Divers weights and measures" were deprecated by the wise king: Proverbs, xx. 10. And similar grievances led to the declaration, in Magna Charta, that there should be but "one weight and measure throughout the kingdom." To secure uniformity, numerous statutes have from time to time been passed in England and by the various states in this country.

It was especially proper that the legislature should fix or define a "perch" of masonry, for, aside from statute, the amount is not only uncertain, but this uncertainty is of a most material character. Webster (Dict., Unabridged, 1865, *voce* Perch) thus defines it: "In solid measure, a mass sixteen and one half feet long, or a foot each in height and in breadth, or sixteen and one half cubic feet." Worcester gives no definition in solid measure. Many of the arithmetics fail to define a "perch," but one of the latest (Robinson, p. 169, 1860) says: "A perch of stone or of masonry is sixteen and one half feet long, one and one half feet wide, and one foot high," or twenty-four and three quarters cubic feet. The New American Encyclopedia (*voce* Perch), after giving other definitions, adds: "In masonry, a perch is equal to twenty-five cubic feet."

To obviate this uncertainty, and to secure uniformity

throughout the state, were the objects of the statute. If a man in Davenport contracts with an inhabitant of Leclaire for a perch of stone, or with his neighbor mechanic to lay up a perch, the statute binds both parties, and local customs fixing a different measure cannot be set up, unless mentioned in the contract. To allow it to be done would nullify the letter and subvert the policy of the statute,—would introduce that uncertainty and resulting litigation which it was the manifest and wise design of the statute to remove and prevent.

Thus we regard the case upon principle. Counsel cited no authorities directly applicable, but our own examination has shown that our opinion is amply and uniformly supported by adjudications elsewhere. Thus the same view of precisely a similar question has been taken by the supreme court of Pennsylvania in a case essentially the same as the one at bar.

The statute of that state of April 15, 1834, provided that "twenty hundred shall make one ton." An agreement in writing was made whereby the defendant contracted "to weigh off and deliver forty tons of pig metal at twenty dollars per ton"; breach, that defendant had delivered but thirty-four and one half tons. On the trial plaintiff offered to prove "that the universal custom with dealers in pig metal is to buy and sell by the gross ton of 2,268 pounds, and that defendant has always sold according to that weight and usage." The district court received the evidence, and it was proved that for twenty-four years the custom at the place where the metal was by the contract to be delivered was universal to give 2,268 pounds sand mound metal to the ton, and the plaintiff accordingly recovered. But on appeal this judgment was reversed by the supreme court. Lewis, C. J., delivering the opinion, says: "If twenty hundred pounds make a ton, the defendant had delivered, before suit brought, the quantity required by his covenant. But the plaintiff claimed 2,268 pounds to the ton, and the court, on proof of a custom 'among those dealing in metal throughout the iron region up the Allegany River, where the contract in suit was made, and where the metal was to be delivered,' permitted the jury to find that the contract was for the number of pounds claimed by the plaintiff." The supreme court considered that it was important that the standard should be uniform throughout the state, and binding upon all men within it. Local customs would contravene this policy, and lead to the uncertainty which the statute intended to prevent. The statute entered into the contract and formed an essential

part of it. The contract must be intended to have been made with reference to the law. Being in writing, the court should construe it. The statute abolishes the custom. And it was accordingly held to be error to admit the evidence of custom to control the statute, and permit the jury on such evidence to find the contract to be different from its legal import: *Evans v. Myers*, 25 Pa. St. 114 (1855); followed in *Weaver v. Fegely* (holding that a ton of coal consisted of 2,000 and not 2,240 pounds), 29 Id. 27 [70 Am. Dec. 151] (1857). The same point was expressly decided the same way in *Many v. Beekman Iron Co.*, 9 Paige, 188, 195 (1841). Chancellor Walworth there says: "But where a positive statute has declared the meaning or legal signification of a word in reference to its use in contracts generally, I am not aware of any case in which a court of law has gone so far as to receive parol evidence to explain a written contract expressed in the language of the statute, by showing that the statutory term in that particular contract meant something else than that which the legislature has declared should be its meaning." See also *Noble v. Durell*, 3 Term Rep. 271; *Hockin v. Cooke*, 4 Id. 314; *King v. Major*, 4 Id. 750; *King v. Arnold*, 5 Id. 353; *Paull v. Lewis*, 4 Watts, 402; Addison on Contracts, 854; *Trueman v. Loder*, 11 Ad. & E. 599; *Taylor v. Briggs*, 2 Car. & P. 525. The present case is essentially different from *Pilmer v. Bank*, 16 Iowa, 321, as there was in that case no express statutory definition of the word "currency." In the case before us the contract was made after the statute. The statute applied to it. And the statute in so many words declares that "a perch shall be taken to mean twenty-five feet cubic measure, where no other measure is expressed." Here no other was expressed. The district court "held that the plaintiff might show an express or implied contract to count sixteen and one half feet to the perch, or that the plaintiff so understood it," etc. This looks plausible. But let us examine it. There was no pretense of any other contract except the written one before alluded to, which did not define the quantity a perch contained. An express contemporaneous contract would have to be in writing, or else the agreement would be partly written and partly verbal. There was no express contract on this point shown, written or verbal, contemporaneous or subsequent. Under these circumstances, and under the issues, evidence showing an implied contract or understanding different from the plain and legal meaning of the written and express agreement was obviously incompetent. Suppose,

however, that the parties in fact both meant a perch of sixteen and one half feet, and that defendant is now seeking to hold the plaintiff to a different agreement, to obtain and retain an unjust advantage. Upon the evidence contained in the record, considering the low price of the work, the testimony of the plaintiff as to his understanding, that of masons as to the custom, the fact that a perch is in many places considered, and in a standard dictionary defined to be, sixteen and one half feet, and particularly the silence of the defendant on the point of his understanding, the court having allowed this field of inquiry to be gone into, there is room to believe that the parties did in fact contemplate a perch of sixteen and one half feet, and that the contract for some reason failed in this respect to express the intention of the parties. But if this is so, the plaintiff must correct the contract to conform to the actual intention of the parties, and have the words "sixteen and one half cubic feet" inserted in the contract after the words "per perch." To reform the contract, he must of course bring his case, by the proof, within the rules and practice of courts of equity on this subject. In point, see *Many v. Beekman Iron Co.*, 9 Paige, 188. As the case stood, the court erred in receiving the testimony and allowing a recovery on the basis of sixteen and one half feet to a perch. We only observe that if the extra work was to be paid for at what it was reasonably worth, instead of by the perch, the dispute as to the quantity in a perch would, as respects the extra work, be immaterial.

For the reasons above given the judgment of the district court is reversed, and the cause remanded. The district court will give the plaintiff, if he asks it, leave, on such terms as to costs as it may deem proper, to amend his petition and claim a reformation of the contract, which will be tried by the first method, unless the parties otherwise agree. When this issue is decided (whether the decision shall be in favor of a reformation of the contract or not), the court will then proceed to try the cause as one by ordinary proceedings, unless the parties stipulate for some other mode of trial.

Reversed.

STATES MAY REGULATE WEIGHTS AND MEASURES until Congress exercises its power in this respect: *Wesser v. Fegely*, 70 Am. Dec. 151, and note 154, treating this subject.

GREEN v. SCRANAGE.

[19 Iowa, 461.]

MORTGAGE BY WIFE OF HER SEPARATE PROPERTY TO SECURE HUSBAND'S DEBT, and in consideration of an extension of time for the payment thereof, is valid and enforceable against the property, if fairly obtained.

FALSE REPRESENTATIONS MADE TO WIFE BY HUSBAND, OR UNDUE INFLUENCE exerted by him to induce her to execute a mortgage on her separate property to secure his debt, she having afterwards duly acknowledged it, will not affect the mortgagee or prejudice his security, if the husband's conduct was without the instigation, procurement, knowledge, or consent of the mortgagee.

MORTGAGE BY WIFE OF HER SEPARATE PROPERTY TO SECURE HUSBAND'S DEBT IS INVALID if she was induced to execute it from fear excited by threats made to her by the mortgagee of an illegal criminal prosecution against her husband.

MORTGAGE BY WIFE OF HER SEPARATE PROPERTY TO SECURE HUSBAND'S DEBT IS VALID, though executed because of the mortgagee's threats of criminal prosecution against her husband, if the debt is just, and the criminal accusation was well founded, or upon reasonable grounds believed to be so by the mortgagee, and the wife freely and deliberately executed the mortgage, without undue influence by the mortgagee, unless the circumstances are such as render it illegal as an agreement to compound a felony.

SUIT by Green and Densmore against Scranage and wife, to foreclose a mortgage executed by the defendants, to secure a promissory note signed by both of them. The wife alone defended the suit, and set up in her answer her coverture; that the land mortgaged was her separate property; that the debt was her husband's debt; and that the note and mortgage were procured by the joint fraud of her husband and one of the plaintiffs. The fraud alleged consisted of threats made to her by one of the plaintiffs, that if she did not execute the note and mortgage, the plaintiffs would prosecute her husband criminally for obtaining money under false pretenses. The verdict was for the defendant, Mrs. Scranage, and the plaintiffs appeal. In other respects the opinion states the case.

Finch, Clark, and Rice, for the appellants.

Phillips and Phillips, for the appellees.

By Court, DILLON, J. The court charged the jury as follows: "1. This is an action against Mrs. Scranage for the foreclosure of a mortgage. She admits the execution of the note and mortgage, but alleges that the execution thereof was obtained through fraud and undue influence used by the plaintiff Green, and her husband, Scranage.

"Now, if you believe from the evidence that the plaintiff Green, or Green and Scranage, by undue influence, induced Mrs. Scranage to execute the note and mortgage, so that you believe it was not her voluntary act and deed, that such undue influences consisted in threats to prosecute the husband for the commission of a crime, or by words amounting to such threats, and that she would consequently be disgraced by reason of such prosecution, unless she signed the note and mortgage, then such conduct was fraudulent, and if through such influences she signed the same, it is a fraud upon her rights, and you should find for the defendants."

The court further instructed the jury: 2. That whether the mortgage was obtained from Mrs. Scranage fraudulently or not, still she is not liable, being a married woman, "unless the jury further find from the evidence that the execution of the note related to her own separate property, or was for the expenses of the family, or education of the children, or purports to bind herself only."

Deferring, for the present, any consideration of the first portion of the charge, it is clear that the last charge or direction to the jury above set out is erroneous. We will assume that, as against the plaintiffs, the property mortgaged was the wife's. It seems at one time to have been the husband's, to have been conveyed by him to one Van Meter, to secure a debt owing to him, which debt was paid off by the brothers of Mrs. Scranage with money from their father's estate belonging to her; and with the husband's consent, Van Meter conveyed the land to one of her brothers, and he subsequently conveyed it to his sister, Mrs. Scranage.

This was prior to the time when the plaintiffs became creditors of the husband

The cause was tried in the district court prior to the publication of the decisions of this court in *Jones v. Crosthwaite*, 17 Iowa, 493, and *Patton v. Kinsman*, 17 Id. 428.

We extract the following from the case last named:—

"The transaction with Kinsman was, in equity, a mortgage of the wife's separate property to him. This is binding upon her in equity, and equity will enforce the debt, not against her personally, indeed, but against the property which she has pledged for its payment. 'A wife,' says Kent (2 Kent's Com. 167), 'may also sell or mortgage her separate estate for her husband's debts, and such a mortgage, when founded upon a valuable consideration, and not unfairly obtained, is enforce-

able in equity against the property pledged. See also *Jones v. Crossthwaite*, 17 Iowa, 393, and cases cited on page 399; *Gahn v. Niemcewicz*, 11 Wend. 312; *Young v. Graff*, 28 Ill. 20; 2 Story's Eq. Jur., sec. 1399; *Demarest v. Wynkoop*, 3 Johns. Ch. 129 [8 Am. Dec. 467]; *Clancy*, 589; *Hawley v. Bradford*, 9 Paige, 200 [37 Am. Dec. 390]; *Loomer v. Wheelwright*, 3 Sand. Ch. 135; *Vartie v. Underwood*, 18 Barb. 561; *Sheidle v. Weishlee*, 16 Pa. St. 184; *Knight v. Whitehead*, 26 Miss. 246; *Wolf v. Van Meter*, 19 Iowa, 134; *County of Johnson v. Rugg*, 18 Id. 138; *Tiffany and Bullard on Trusts*, 687."

The court's charge laid down a different doctrine, asserting, in substance, that the defendant was not liable unless the note related to her own separate property or was given for family expenses, etc.

The jury, on this point, should have been instructed that if her husband owed the debt, this, particularly if the plaintiff extended the time of payment in consideration that the wife would execute a mortgage upon the property to secure it, would constitute a valuable consideration for the mortgage, though the wife was only a surety for her husband; and such mortgage would, in equity, be binding upon the property therein described, provided it was not fraudulently or unfairly obtained.

The first instruction of the court, above copied, related to the alleged fraud in obtaining the mortgage. The instructions of the court should be applicable to the special circumstances of the case before it. The instructions of the court in relation to undue influences are neither as full nor as accurate and precise as they should have been.

The jury should have been told that any false representations made to the wife by the husband, or undue influence exerted by him to induce her to execute the mortgage, she having afterwards duly acknowledged it, would not affect the plaintiffs or prejudice their security, if this conduct on the part of the husband was without their instigation, procurement, knowledge, or consent: *Baldwin v. Snowden*, 11 Ohio St. 203 [78 Am. Dec. 303], and authorities there cited; *McHenry v. Day*, 13 Iowa, 445 [81 Am. Dec. 438].

The wife seeks to be relieved from her mortgage on the ground of fraud on the part of the plaintiffs, and this fraud or unfair conduct must be brought home to them.

On the other hand, if the wife was induced to execute the mortgage from fear excited by threats made to her by the

plaintiffs of an illegal criminal prosecution against her husband, the instrument thus obtained would not be binding upon her.

For example, if the criminal association was known by the plaintiffs to be unfounded, and the threats were made for the purpose of overcoming the free will of the wife, and did so overcome it, the security thereby obtained would be set aside, on account of the attending oppression or fraudulent advantage taken of the wife.

But if the debt were just, and the criminal accusation was well founded, or, upon reasonable grounds, believed to be so by the plaintiffs, and the wife freely, upon her own deliberate conviction of what was best, and without undue influence exerted by the plaintiffs, executed the security, it would be valid, unless given under such circumstances as would render it illegal as an agreement or arrangement to compound a felony or not to prosecute it: *Revision*, secs. 4286, 4287, 4670, 5106; 1 *Parsons on Notes and Bills*, 215; *Chitty on Contracts*, 743, and authorities cited.

In support and illustration of these views, see *Eadie v. Slimmon*, 26 N. Y. 9 [82 Am. Dec. 395] (1862), and cases cited; 2 *Story's Eq. Jur.*, sec. 239; *Tiffany and Bullard on Trusts*, 162, 687; *Willard's Eq. Jur.* 208, and authorities cited; *Fry v. Fry*, 7 Paige, 461; *Jaques v. M. E. Church*, 17 Johns. 548 [8 Am. Dec. 447]; *Cruger v. Cruger*, 5 Barb. 225; *Whelan v. Whelan*, 3 Cow. 537.

Reversed and remanded

COLE, J., being of counsel, took no part in the consideration of this case.

FALSE REPRESENTATIONS OF HUSBAND INDUCING WIFE TO EXECUTE ENCUMBRANCE on homestead cannot affect innocent parties who have loaned money upon the security, if it be duly acknowledged by the wife: *McHenry v. Day*, 81 Am. Dec. 438; but see *Central Bank v. Copeland*, 81 Id. 597, and note 602. The grantee of a married woman, if ignorant of any facts putting him upon inquiry, may rely upon the certificate of acknowledgment if that be in due form: *Louden v. Blythe*, 67 Id. 442, and note 445.

THREAT OF LEGAL PROCESS IS NOT DURESS. The party may plead and make proof and show that he is not liable: *Claffin v. McDonough*, 84 Am. Dec. 64, note 57; *Fulton v. Hood*, 75 Id. 664, note 672. But in *Eadie v. Slimmon*, 82 Id. 395, it is held that an assignment procured from a woman by threatening to arrest her husband and prosecute him is void. See also *Central Bank v. Copeland*, 81 Id. 597, and note 602.

WIFE MAY MORTGAGE HER SEPARATE PROPERTY TO SECURE HUSBAND'S DEBT: *Jamison v. Jamison*, 31 Am. Dec. 536; *Holts v. Francois*, 51 Id. 760;

Hawley v. Bradford, 37 Id. 390; *Sampson v. Williamson*, 55 Id. 762; but see *Bayler v. Commonwealth*, 80 Id. 551. The principal case is cited to the point that a mortgage upon a homestead of which the legal title is in the wife, executed by the husband and wife to secure a note given for an existing debt of their son, in consideration of an extension of time, is valid and may be enforced: *Low Bros. & Co. v. Anderson*, 41 Iowa, 478.

HALL'S ADM'X v. McHENRY.

[19 Iowa, 521.]

ADDITION OF ANOTHER MAKER TO NOTE AT INSTANCE OF PAYEE, and without the knowledge of the other makers, after the note is completed and delivered, operates to discharge the other makers.

ADDITION OF ANOTHER MAKER TO NOTE BEFORE ITS COMPLETION AND DELIVERY will not discharge original makers, if made without the knowledge of the payee, *semble*.

SURETY ON NOTE IS DISCHARGED FROM LIABILITY BY ADDITION OF ANOTHER SURETY without his consent, though before the delivery of the note, if the payee knew that the addition was made without his consent.

CUTTING OFF NAME OF ONE SURETY WITHOUT CONSENT OF OTHER SURETY by payee is such an alteration of a note as will discharge the latter surety from liability thereon.

ACTION on promissory note against the defendant as surety for the maker Gill. In his answer the defendant alleged that he signed as the surety of Gill; that the note was then blank as to the payee, and did not contain the words "in specie" after the word "dollars"; that Gill intended to use the note to obtain a loan from Hall, but had authority to fill the blank with the name of any person who would loan the money; that Hall refused to take the note as written, and, without the defendant's knowledge, had the words "in specie" written in after the word "dollars"; that Gill, for the benefit and at the instance of Hall, and without the defendant's knowledge, procured one Lyon to sign the note as co-obligor, and he placed his name immediately under the defendant's name; and the note in this form was delivered to Hall, who took it with full knowledge of all the facts. It was also alleged that some four years after the note became due, Hall, or some one for him, or with his consent, or the plaintiff as administratrix, altered the note without the defendant's knowledge or consent, by cutting off the signature of Lyon, and leaving it with the signatures of Gill and the defendant. And the defendant claimed that by these additions and alterations in the note he was released from his liability thereon. Plaintiff demurred to

this answer; the demurrer was overruled, and plaintiff appealed.

B. N. Kinyon, for the appellant.

McHenry, *pro se*.

By Court, WRIGHT, J. Appellee in his argument does not insist that the adding of the words "in specie" had the effect to discharge him. We may therefore dismiss this feature of the case without comment, simply referring to *Sanderson v. Symonds*, 1 Brod. & B. 426, and *Stephens v. Graham*, 7 Serg. & R. 505 [10 Am. Dec. 485], as throwing some light on the question involved.

The points relied upon are: 1. That the addition of the name of Lyon as a co-surety or co-promisor, without defendant's consent, this being known to Hall, so changed the instrument as that it was not his (defendant's) undertaking; 2. That if, notwithstanding this addition, it was binding, then plaintiff or payee, by cutting off the name of the third promisor, so changed the note or affected its integrity as to discharge defendant.

When a note has been fully issued, completed, and delivered to the payee, the doctrine seems to be well sustained that the addition of another maker at the instance of the payee, and without the knowledge of the other makers, operates to discharge the latter. Thus, says Mr. Parsons, if a person sign a joint and several note with another as surety, and a third name be afterwards added, also as surety, without his consent, the note is vitiated as to the first surety: 2 Notes and Bills, 556.

The reasons or principles on which this rule is founded we need not discuss, as they will be found referred to at length by the learned author, and also in the following cases: *Chappell v. Spencer*, 23 Barb. 584; *Harper v. State*, 7 Blackf. 61; *Bank of Limestone v. Penick*, 5 T. B. Mon. 25; *Pulliam v. Withers*, 8 Dana, 98 [33 Am. Dec. 479]; *Adams v. Frye*, 3 Met. 103; note and authorities cited to *Smith v. Crooker*, 5 Mass. 540; *Master v. Miller*, 4 Term Rep. 320; S. C., 1 Smith's Lead. Cas. 458, and note; 2 Parsons on Contracts, sec. 7, p. 716; Addison on Contracts, 1082; and see particularly the comparatively recent case (decided in 1855) of *Gardner v. Walsh*, 5 El. & B. 82, overruling *Catton v. Simpson*, 8 Ad. & E. 136.

These cases and authorities, as far as we have been able to examine them, treat of the doctrine as applied to a note fully

issued and delivered, and when the name is afterwards obtained, at the instance of the payee, or with his knowledge or consent, without the consent of the original maker or makers. Indeed, we can find no case precisely analogous to the one at bar. And we are not prepared to go to the extent of holding that such addition of a name before the complete execution of the instrument would have the effect of discharging the other joint and several maker, when the payee had no knowledge of the circumstances under which the note was signed by the joint maker, or of his intention at the time of signing. It will be readily seen that this might involve the inquiry, whether the surety, by delivering the note to the principal, had not placed it in his power to procure other parties, and whether he, rather than the payee, should not suffer the consequences thereof,—a field of inquiry not free from difficulty, and one which, in our opinion, we need not enter into in this instance.

This note, on its face, shows that it is made by Gill as principal and McHenry as his surety. In addition to this, it is averred in the answer that Hall, the payee, took the note with a full knowledge of all the facts. If so, then he knew that McHenry signed the note intending to be the sole surety of Gill, and that he did not intend to be jointly and severally bound with any other person. This being so, it seems to us that the reason of the rule applies, which would declare the defendant discharged when the other name was added after the note was fully completed and delivered. For the payee knew just as well what defendant's contract was, what he intended and understood liability, as though Lyon had not signed until after he had accepted the note and parted with his money. And this is especially so when we consider that defendant was a surety, known to be such to the payee, whose rights are guarded with great care, and as to whom the doctrine under discussion should be applied as a protection, and not to his injury: 2 Parsons on Notes and Bills, 561; *Waterman v. Vose*, 43 Me. 504; *Lisle v. Rogers*, 18 B. Mon. 528.

But however this may be (and it is due to one member of the court, Cole, J., to say, that he is not prepared to fully commit himself to this position, in the absence of some element of fraud on the part of the payee, or proof of injury to the defendant), yet we unite in the opinion that the subsequent act of the payee, in cutting off the name of Lyon, without the knowledge of the other surety, had the effect of so

altering the note as to discharge defendant. This amounted to a spoliation of the instrument, or so affected its integrity by the act of the payee as that he should not be allowed to claim any advantage from it as against the other surety. The payee should not be allowed thus at his mere will, however honest his motive, to tamper with a contract which should be kept entire and unmutilated, and which frequently, and indeed, generally, is the best and only evidence of the rights, equities, and liabilities of all the parties to it. The policy of the law is, to look to and secure this integrity, and especially when it is assailed by the payee himself, without looking beyond to ascertain whether there has been actual injury or fraud. In support of this view we refer to the authorities already cited, as also *Marn v. Bradley*, 11 Mees. & W. 590; *Gillett v. Sweet*, 1 Gilm. 475.

So that we unite, without, perhaps, placing our opinions upon the same grounds or adopting the same reasoning, in the conclusion that the judgment below should be affirmed.

MATERIAL ALTERATION OF NEGOTIABLE INSTRUMENT RENDERS IT VOID: *Williamson v. Smith*, 78 Am. Dec. 478, and note 486; *Fay v. Smith*, 79 Id. 752, and note 754. But the payee of the note may alter it in any way authorized by the maker: *Wilson v. Henderson*, 48 Id. 716; *Humphreys v. Gailow*, 38 Id. 499; *Simpson v. Stackhouse*, 49 Id. 554; *Inglish v. Breneman*, 41 Id. 96. Cutting or tearing off a material portion of the note is a material alteration avoiding it if done without the consent of the maker: *Wheelock v. Freeman*, 23 Id. 674; *Hall v. Commonwealth*, 30 Id. 685. The principal case is cited to the point that after the delivery of a joint and several note, the addition of the name of a third person as maker, with the privity of the holder, but without the consent of the original signers, vitiates the note as to the latter: *Wallace v. Jewell*, 21 Ohio St. 173.

McCLELLAN v. MARSHALL.

[19 IOWA, 561.]

INJUNCTION MAY ISSUE TO RESTRAIN PROCEEDINGS ON EXECUTION issued on an alternative judgment for the value of property replevied in default of a return thereof, where the property has been tendered back within a time that is reasonable under all the circumstances of the case, especially where the plaintiff has paid all the costs of the replevin suit, is the real owner of the property, and offered to return the property so as to open the way for a new demand and recovery of the property by suit.

PETITION in equity averring that plaintiff was the owner of a mare which strayed away and was taken up by the defendant, who failed to comply with any of the provisions of the

estray law; that afterwards plaintiff, upon defendant's refusal to surrender the mare, replevied her; that upon the trial of the action he voluntarily suffered a nonsuit, because he had not at the time sufficient proof of a demand which the court held it was necessary to prove in order to maintain the action; and the court thereupon rendered judgment against plaintiff for a return of the property, and in default thereof a judgment for \$160, the value of the mare; that defendant resided forty miles from the residence of plaintiff; that at the time of the rendition of the judgment the mare had received an injury, and it was impossible for her to travel, but that as soon as she was in a condition to do so, about thirty days after the rendition of the judgment, plaintiff started with her and arrived at defendant's residence about three days later and tendered the mare to him, but he refused to receive her; that before he made the tender he had paid all the costs of the replevin suit, including the costs of execution, which defendant had previously sued out; that the offer to return the property was made as soon as was practicable under the circumstances; that plaintiff is the real owner of the mare; that defendant's judgment was unjust and irregular; that it was rendered upon the taking of the nonsuit, without any trial whatever or the hearing of any evidence as to the ownership of the property; that defendant is insolvent and is now seeking to enforce the judgment by execution, notwithstanding the offer of plaintiff to return the property, though in fact plaintiff intended if the mare was received, to redemand a delivery of her, and if refused, to commence anew the action of replevin. And therefore plaintiff prayed that the court restrain further proceedings upon the execution, and grant the requisite relief, etc. A demurrer to this petition was sustained, and the plaintiff appealed.

Williamson and St. John, for the appellant.

Withrow and Smith, for the appellee.

By Court, LOWE, C. J. It is objected, first, under the demurrer, that a case for equitable interference is not made by the petition; that although the proceedings in the replevin suit may be voidable for error, still, they are not void, and may not be enjoined in equity in the absence of any alleged fraud, mistake, accident, or surprise. It is true that none of these things are made the ground of the petition, nor yet, on the other hand, is it the purpose of the bill to restrain the

proceedings in that suit, so much for matters occurring before and at the rendition of the judgment therein as for what subsequently transpired. If, in a very few days after the rendition of the judgment for the return of the property, the plaintiff had tendered a delivery of the same to the defendant in the replevin suit, and he had refused to accept the property, and insisted on enforcing the alternative judgment for the value of the property by execution, we suppose, in such a contingency it would be admitted that the chancellor would be justified in restraining the execution. And yet, this is just what the plaintiff has done in this case, except that his offer to return the property was not in a very few days after the judgment, but within thirty-two or thirty-three days thereafter. The question then is, whether a court of equity will consider the offer to return as having been made within a reasonable time. What may or may not be reasonable, will and often does depend upon circumstances which equity will regard. The demurrer accepts as true the material allegations bearing upon this point. The statement is, that plaintiff resided some forty miles from the defendant, where the return was to be made; that at the time the judgment was entered, the mare had been injured, and was lame, so that it was impossible for her to travel, and that he offered to make the return as soon as it was practicable. Now, the delay of thirty days is not very unreasonable in itself, but when it is accounted for upon circumstances so controlling as that which constitutes the above excuse, it is but the dictate of common justice that the same should be received as satisfactory. Add, then, to this the alleged fact that the plaintiff had paid all the costs of the replevin suit, including that of the execution which had just been put into the hands of the officer, and upon which no action had been taken at the time of the proffered return of the property; that the judgment in the replevin suit fails to specify within what time the return should be made; that the right of possession and title of the property were, as a matter of fact, in the plaintiff; that the defendant was a wrong-doer, *ab initio*, as respects the same; that the delay in the return thereof was the result of necessity, and not from any wish or interest to treat the order of the court with defiance; that his purpose in offering to return the property, besides complying with the order of the court, was to open the way for a new demand and recovery of the property by suit. These are such an aggrega-

tion of facts and circumstances as, in our opinion, justly calls for the equitable interference and cognizance of the court. This conceded, all the other objections raised to the bill by the demurrer insisted upon in argument are answered and covered thereby, and we hold that the demurrer should have been overruled instead of sustained, wherefore the judgment will be reversed and the cause remanded.

Reversed.

DEFENDANT IN DEBITUM AGAINST WHOM JUDGMENT HAS BEEN RENDERED has no right to pay the value assessed and retain the property, and equity will not enjoin the enforcement of the judgment for the property upon a tender of the value thereof: *Jordan v. Thomas*, 60 Am. Dec. 337.

CASES
IN THE
SUPREME COURT
OF
KANSAS.

CUSIO v. DOUGLASS.

[3 KANSAS, 122.]

JUDGMENT RENDERED PRIOR TO ADOPTION OF CONSTITUTION IS NOT EXCEPTED from the operation of the homestead exemption clause by the clause providing that all contracts, judgments, etc., shall continue after the change from a territorial government to a state government as if no change had taken place, since the object of this clause was to save the right to enforce all contracts, judgments, etc., leaving the means of enforcing them subject to such changes as the constitution or legislature under it might make, and not to prohibit a change of remedy.

EXEMPTION LAWS APPLY TO REMEDY ONLY, AND MAY AFFECT PRIOR CONTRACTS without impairing the obligation thereof, so long as they are within the dictates of sound policy, humanity, and the well-being of the community; and within these limits the state is the sole judge of the extent of the exemptions.

CONSTITUTIONAL PROVISION EXEMPTING AS HOMESTEAD 160 ACRES of farming land, or one acre within the limits of any incorporated city or town, does not impair the obligation of contracts, notwithstanding the value may vary greatly with the size of the city or the nearness of the land thereto; since the average of the homesteads is not unreasonable.

STATE IS NOT OMNIPOTENT AS TO AMOUNT OF PROPERTY TO BE EXEMPTED AS HOMESTEAD, and its action will not be constitutional if it shall be apparent that the object was not so much to secure the well-being of the citizens as to enable them to hold large amounts of property for their own aggrandizement and for other purposes than that of homesteads.

ACTION OF STATE IN EXEMPTING PROPERTY AS HOMESTEAD WILL BE SUSTAINED AS CONSTITUTIONAL, although it may here and there work an individual hardship, so long as the extent of the homestead shall be in accordance with sound policy and humanity, and no greater than shall be reasonably necessary to protect the citizens in their pursuits necessary to their existence and well-being.

PETITION for injunction against sale of property on execution. The opinion states the case.

Thomas P. Fenlon, for the plaintiff in error.

Douglass and Stillings, for the defendants in error.

By Court, CROZIER, C. J. On the twenty-seventh day of August, A. D. 1860, John C. Douglass, one of the defendants in error, before a justice of the peace in Leavenworth County, recovered a judgment against Mary Cusic, the plaintiff in error, for one hundred dollars and costs of suit, and on the twenty-fifth day of March, A. D. 1861, caused to be filed in the office of the clerk of the district court for said county a transcript of that judgment. In the year 1863, Mrs. Cusic became the owner of three lots in Leavenworth, upon which is a large brick house. The lots are all in one inclosure, and the whole is occupied by her as a homestead, she being the head of a family. The lots do not altogether in quantity amount to one acre of land. On the first day of February, 1864, an execution was, by the clerk, issued upon the judgment and delivered to the sheriff of the county, who, having levied upon one of the lots, was proceeding to advertise and sell the same when a petition, setting out the foregoing facts, was filed in the clerk's office of the district court of Leavenworth County, praying an injunction against the sale of the property. To this petition a demurrer was interposed, upon the ground that the petition did not state facts sufficient to constitute a cause of action, which demurrer was sustained. To reverse this judgment this proceeding was instituted.

It is claimed by the plaintiff in error that the property is exempt from sale upon the judgment referred to, under the homestead exemption provision of the constitution. To this claim the defendant interposes two objections: 1. The first section of the schedule to the constitution excepts this judgment from the operation of the homestead exemption clause; and 2. If it be not excepted, then the exemption clause is in contravention of the constitution of the United States, as impairing the obligations of contracts.

These objections will be considered in the order stated.

The clause of the schedule relied upon is as follows:—

“That no inconvenience may arise from the change from a territorial government to a permanent state government, it is declared by this constitution that all suits, rights, actions, prosecutions, recognizances, contracts, judgments, and claims,

both as respects individuals and bodies corporate, shall continue as if no change had taken place."

The defendant in error claims that this clause continues to him the same means of enforcing his judgment that he had before the adoption of the constitution; that he may subject to its satisfaction now any property that would have been liable had no state government been organized; that inasmuch as he might then have caused to be sold any real estate exceeding one thousand dollars in value, he may do so now.

Such the court does not conceive to be the meaning of the clause. Its object was to save all contracts, judgments, etc., so far as the right to enforce them was concerned, leaving the means of enforcing and carrying them out subject to such changes as the adoption of the constitution or the legislature under it might make. It certainly was not the intention to provide that no change of remedy which might be adopted under the constitution should apply to the enforcement of a contract made or judgment rendered before its adoption. Such a construction would operate to keep in force laws flatly repugnant to the constitution itself, and such laws are by direct implication repealed by that instrument. The court is therefore of opinion that the first objection referred to is not well founded.

2. The other objection presents one of the most important questions ever addressed to this tribunal. The validity of a provision of the organic law of the state is denied, and a decision on the subject is unavoidable. There can be no mistaking the will of the people upon the subject. The clause in controversy was referred to them for ratification or rejection, separate from the other provisions of the constitution, and was adopted by a very large majority. Their attention was especially directed to it, and if one provision more than another could have binding force upon law-makers and law-expounders, such pre-eminence should be attributed to this one. But notwithstanding these considerations, if it be in contravention of the constitution of the United States as to transactions occurring before its adoption, it is void and this court must so declare it.

The clause is in these words: "A homestead to the extent of 160 acres of farming land, or of one acre within the limits of any incorporated town or city, occupied as a residence by the family of the owner, together with all the improvements on the same, shall be exempted from forced sale under any

process of law, and shall not be alienated without the joint consent of both husband and wife when that relation exists; but no property shall be exempted from sale for taxes, or for the payment of obligations contracted for the purchase of said premises, or for the erection of improvements thereon, provided the provisions of this section shall not apply to any process of law obtained by virtue of a lien given by the consent of both husband and wife."

The defendant in error contends that this provision, so far as it relates to this case, is contrary to the tenth section of the first article of the constitution of the United States, which provides that "no state shall pass any law impairing the obligation of contracts." If the provision of the state constitution contravenes this clause as construed by the supreme court of the United States, it must fall. That tribunal is the supreme arbiter of all questions of the construction of the national constitution, and this court should adopt its decisions.

Much juridical discussion has been indulged in concerning what pertains to the contract and what to the remedy; and although it was at one time held that the law of the remedy might be changed to an almost unlimited extent without impairing what was considered the obligation of the contract, it is now decided that very slight changes in the remedy will impair its obligation. But the line of demarkation between what will and what will not so affect the contract is so illy defined that it is exceedingly difficult to trace it. For example, it has been held that to abolish imprisonment for debt would not impair the obligation of a contract, yet to authorize a redemption of lands sold upon execution would have that effect. Also, that to require the property of one debtor to bring two thirds of its real value would be unconstitutional, while it would be lawful to provide that the property of another should not be used at all. When the law did not require an appraisement of real estate nor exempt household furniture or implements of husbandry, two men might on the same day contract debts, the one owning real estate, the other nothing but personal property, and under the decisions the legislature could not by subsequent legislation require the land to bring two thirds of its value in case of sale, but might provide the other man's property should not be sold at all. This court will not attempt to reconcile this incongruity or to ascertain from the opinions of the supreme court the location of the line which separates the lawful and unlawful provisions of

the legislature in reference to the remedy on contracts. It will be sufficient if that court has established or recognized a principle which should control in this case. That it has done so may be made apparent.

In the case of *Bronson v. Kinzie*, 1 How. 311, the supreme court of the United States say: "A state may regulate at pleasure the modes of proceeding in its courts in relation to past contracts as well as future. It may, for example, shorten the period of time within which claims shall be barred by the statute of limitations. It may, if it think proper, direct that necessary implements of agriculture or the tools of a mechanic or articles of necessity and household furniture shall, like wearing apparel, not be liable to execution on judgments. Regulations of this description have always been considered in every civilized community as properly belonging to the remedy to be exercised or not by every sovereignty according to its own views of policy and humanity. It must reside in every state to enable it to secure its own citizens from unjust and harassing litigation, and to protect them in those pursuits which are necessary to the existence and well-being of every community. And although a new remedy may be deemed less convenient than the old one, and may in some degree render the recovery of debts more tardy and difficult, yet it will not follow that the law is unconstitutional. Whatever belongs merely to the remedy may be altered according to the will of the state, provided the alteration does not impair the obligation of the contract. But if that effect is produced, it is immaterial whether it is done by acting on the remedy or directly on the contract itself. In either case it is protected by the constitution."

Here is a clear recognition of the power of a state to take away from a creditor his right to subject a portion of his debtor's property to the satisfaction of his debt, but the doctrine is not predicated upon any admission of the power of the legislature to impair the obligation of the contract. It is upon the theory that such legislation applies to the remedy, and that the power to change it extends to such modifications as sound policy, humanity, and the well-being of the community shall dictate. So long as the legislature shall keep within these limits, the obligation of the contract is not impaired. If the exemption of a homestead be within them, then a law which secures one to the citizen does not impair the obligation of a prior contract.

Now, if from motives of policy and humanity, or to secure the citizens from unjust and harassing litigation, and protect them in the pursuits necessary to the existence and well-being of a community, the state may exempt to the husbandman the implements necessary to enable him to extract from the soil a subsistence for himself and family, or to a mechanic the tools necessary to enable him to earn a livelihood for himself and those dependent upon his labor, why may it not for the same reasons secure them places of abode and shelter? It is just as essential to the well-being of a community that the people have houses to live in as that they have tools and implements to work with. Both are indispensable. The principle that authorizes the exemption of one must necessarily include the other. Hence, so long as the state shall keep within these limits and proceed upon this principle, its action will not be unconstitutional.

But it is said that the provision of the constitution of this state authorizes an exemption largely in excess of what these considerations would justify. A man may, in or near a large city, hold property worth tens of thousands of dollars, and be impregnable to the most deserving creditor; such may, in some instances, be the melancholy fact, nevertheless the provision would not be liable to any constitutional objection. The framers of the constitution were making an instrument which must apply to the whole state, and were obliged to adopt some rule which in its general operation throughout the state would secure a reasonable exemption. One acre, in either of four or five towns that might be named, would be a very large exemption, while the same quantity in any one of the other towns would be a very small one; or a quarter-section of land, adjoining the city of Atchison, would be a splendid homestead, while the same quantity of land in Peketon County would not very much disgust old Fogan himself. The average of the homesteads secured by the provision under consideration is not unreasonable.

It must not be inferred that a state is omnipotent upon this subject, and that if it can fix the amount at one acre in a town it may increase it to ten or twenty acres, and in a like proportion in the country. Its action will not be constitutional if it shall be apparent that the object was not so much to secure the well-being of the citizens as to enable them to hold large amounts of property with a view of making it available to their own aggrandizement for other purposes than that of

homesteads. The state is the sole judge of the proper extent of the exemptions within the limits above indicated, and so long as the extent of the homestead shall be in accordance with sound policy and humanity, and no greater than shall be reasonably necessary to protect the citizens in their pursuits necessary to their existence and well-being, its action must be sustained, although it may here and there work an individual hardship.

The court is therefore of opinion that the second objection is not well founded.

The judgment of the court below sustaining the demurrer will be reversed, and the cause sent back, with instructions to the district court to overrule the demurrer and proceed with the cause.

All the justices concurred.

THE PRINCIPAL CASE IS CITED to the point that a law may be valid that exempts a portion of the debtor's property, such as household furniture, agricultural implements, etc., provided that such portion is not great enough to materially impair the obligation of the contract sought to be enforced: *Deering v. Boyle*, 8 Kan. 535. And it is cited and followed in *Root v. McGrew*, 3 Id. 216.

CONSTITUTIONALITY OF HOMESTEAD EXEMPTION LAWS: See the note to *Rockwell v. Hubbell's Adm'rs*, 45 Am. Dec. 252, where this subject is incidentally treated.

RETROACTIVE HOMESTEAD LAWS IMPAIR OBLIGATION OF CONTRACTS AND ARE UNCONSTITUTIONAL. — The unfortunate *dicta* of Chief Justice Taney in *Bronson v. Kinie*, 1 How. 315, quoted in the principal case, together with those of Woodbury, J., in *Planters' Bank v. Sharp*, 6 Id. 318, led many courts into the error of holding that homestead laws, retroactive in effect and withdrawing the property from the reach of creditors whose debts were contracted before the passage of the laws, were not in conflict with the provision of the United States constitution that no state shall pass any law impairing the obligation of contracts, on the ground that such laws affected the remedy upon the contract, and not its obligation: The principal case; *Mede v. Hand*, 5 Am. L. Reg., N. S., 82; *Root v. McGrew*, 3 Kan. 215; *Sneider v. Heidelberger*, 45 Ala. 126; *Hardeman v. Downer*, 39 Ga. 425; *Pulliam v. Sewell*, 40 Id. 73; *Gunn v. Barry*, 44 Id. 353; *Doughty v. Sheriff*, 27 La. Ann. 355; *Morse v. Gould*, 11 N. Y. 281 (overruling *Danks v. Quackenbush*, 1 Id. 129, and *Quackenbush v. Danks*, 1 Denio, 128); *Hill v. Kessler*, 63 N. C. 437; *Garrett v. Cheshire*, 69 Id. 396; *Barrett v. Richardson*, 76 Id. 429; *Edwards v. Kearney*, 74 Id. 241; S. C., 75 Id. 409; *In re Kennedy*, 2 S. C. 216; and see also *Cook v. McChristian*, 4 Cal. 23; *Rockwell v. Hubbell's Adm'rs*, 2 Doug. 197; S. C., 45 Am. Dec. 246. And some of these decisions went to the extent of holding such laws constitutional even when their effect was to displace liens of attachments, judgments, and mortgages subsisting before the passage of the laws: *Sneider v. Heidelberger*, *Gunn v. Barry*, *In re Kennedy*, *supra*; *Chambliss v. Phelps*, 39 Ga. 386. The doctrine of these cases was certainly justified and upheld by

the language of Chief Justice Taney in *Bronson v. Kinzie*, 1 How. 315. But what was there said was purely *dictum*, as the question did not arise in that case, and it was therefore in no way authoritative. The question, as is said in *Freeman on Executions*, sec. 219, "is not one of hardship or of necessity. It is whether the value of the contract made anterior to the passage of the law is impaired by enforcing the law. Whatever the courts may ultimately determine, it will always require a great deal of sophistry to make it seem that an obligation which could be wholly or partly enforced but for the operation of some law is not impaired by that law." The question is now authoritatively settled in accordance with the opinion here expressed by two decisions of the United States supreme court: *Gunn v. Barry*, 15 Wall. 610; *Edwards v. Kearney*, 96 U. S. 595, whose decisions on questions of constitutional law are binding in all states and upon all courts. And the law now is that state laws or constitutions creating homestead exemptions or enlarging or diminishing homestead exemptions previously existing are unconstitutional in so far as they apply to liabilities created before their passage: *Gunn v. Barry*, 15 Wall. 610 (reversing S. C., 44 Ga. 353); *Edwards v. Kearney*, 96 U. S. 607; *Barnett v. Knight*, 7 Col. 371; *Jones v. Brandon*, 48 Ga. 593; *Gunn v. Thornton*, 49 Id. 380; *Chambless v. Jordan*, 50 Id. 81; *Grant v. Casby*, 51 Id. 460; *Wofford v. Gaines*, 53 Id. 485; *Hiley v. Bridges*, 60 Id. 375; *Boroughs v. White*, 69 Id. 841; *Deering v. Boyle*, 8 Kan. 535; *Kibbey v. Jones*, 7 Bush, 243; *Martin v. Kirkpatrick*, 30 La. Ann., pt. 2, 1214; *Poole v. Cook*, 34 La. Ann. 331; *Tillotson v. Millard*, 7 Minn. 513; S. C., 82 Am. Dec. 112; *Lesley v. Phipps*, 49 Miss. 790; *Pennington v. Seal*, 49 Id. 528; *Ex parte Hewett*, 5 S. C. 409; *Cochran v. Darcy*, 5 Id. 125; *De la Howe v. Harper*, 5 Id. 470; *Hannum v. McInturf*, 11 Heisk. 48, note; S. C., 6 Baxt. 225; *Bryant v. Woods*, 11 Lea, 327; *Paschal v. Cushman*, 28 Tex. 74; *McLane v. Paschal*, 62 Id. 106; *The Homestead Cases*, 22 Gratt. 266; S. C., 12 Am. Rep. 507; *Russell v. Randolph*, 26 Id. 705.

In *Gunn v. Barry*, 15 Wall. 610, the homestead law involved was the constitutional provision of Georgia of 1868, by which the homestead exemption then existing was greatly increased. A creditor had obtained a judgment upon a debt contracted before the adoption of the constitution, which judgment became a lien upon land of the debtor; and this land he afterwards claimed as his homestead. In holding this homestead law unconstitutional in this respect, Mr. Justice Swayne dwelt upon the fact that it operated to displace a lien, and thus divested a vested right. But since the mere divestment of a vested right, if the obligation of a contract is not impaired, does not *per se* render a state law unconstitutional, *Beers v. Haughton*, 9 Pet. 359, *Watson v. Mercer*, 8 Id. 88, the decision is in effect that the law impaired the obligation of the contract; and such is the construction accorded to the decision by the subsequent Georgia cases: *Vide Jones v. Brandon*, *supra*. The supreme court of North Carolina, however, understood the case of *Gunn v. Barry*, 15 Wall. 610, as declaring homestead laws unconstitutional only when they divested vested rights, such as judgment liens, and accordingly held that the constitution of that state of 1868 was not unconstitutional in its application to antecedent contracts, inasmuch as it differs from the constitution of Georgia in diminishing rather than increasing, or at least in not increasing the previously existing homestead exemption: *Garrett v. Cheshire*, 69 N. C. 396; *Barrett v. Richardson*, 76 Id. 429; *Hill v. Kessler*, 63 Id. 437. This construction of *Gunn v. Barry*, *supra*, was not warranted, as we have seen, since the obligation of a contract may be impaired, though no vested right is divested.

The question has at last been squarely presented to the supreme court of
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the United States, and the constitutional ordinance of North Carolina has been held to impair the obligation of antecedent contracts, and to be in so far unconstitutional: *Edwards v. Kearney*, 96 U. S. 607, overruling S. O., 74 N. C. 241; 75 Id. 409. The question is, as was correctly said in *Freeman on Executions*, "whether the value of the contract made anterior to the passage of the law is impaired by enforcing the law." So Mr. Justice Swayne, in *Edwards v. Kearney*, *supra*: "The remedy subsisting in a state when and where a contract is made and is to be performed is a part of its obligation, and any subsequent law of the state which so affects that remedy as substantially to impair and lessen the value of the contract is forbidden by the constitution, and is therefore void." The decision of *Edwards v. Kearney*, *supra*, has been followed in the subsequent North Carolina cases, which no longer allow the constitution of 1868 a retroactive effect, and hold that statutes enacted to carry out the homestead provisions of the constitution are void as to debts contracted prior to the adoption of the constitution, though valid as to debts entered into subsequent to that date: *Gheen v. Summey*, 80 N. C. 189; *Gamble v. Wallerson*, 83 Id. 573; *Keener v. Goodson*, 89 Id. 273; *Grant v. Edwards*, 86 Id. 513; *Mebane v. Layton*, 89 Id. 598.

In Missouri, by virtue of the provision of the state constitution that the legislature shall not pass "any law impairing the obligation of contracts, or retrospective in its operation," exemption laws cannot have a retrospective operation: *Cunningham v. Grey*, 20 Mo. 172; *Talley v. Thompson*, 20 Id. 277. But it is also held that such laws would be in derogation of the federal constitution, and would impair the obligation of contracts: *Harvey v. Wickham*, 23 Id. 116.

The right to a homestead exemption, and its quantity and extent as against creditors, are to be determined by the law which was in force when their debts were created: *Peevey v. Cabaniss*, 70 Ala. 253; *Fearn v. Ward*, 65 Id. 33; *Nelson v. McCreary*, 60 Id. 301; *Keel v. Larkin*, 72 Id. 493; *Cochran v. Miller*, 74 Id. 50; *Bolling v. Jones*, 67 Id. 508. A debt contracted before the passage of a homestead law, and after the passage of the act revived by a new promise from the effect of the statute of limitations, may be enforced regardless of a claim of homestead: *Woodlie v. Towles*, 9 Bart. 592. But where a note was given before the adoption of the constitution which gave the right of homestead, and after the adoption of the constitution, a new note was given for the old note, a judgment on the new note was subject to the debtor's homestead: *Wilson v. Patton*, 87 N. C. 318. So the debtor may have a homestead as against a judgment rendered on a note given since the passage of the homestead laws, though for an indebtedness contracted before: *Hinson v. Adrian*, 92 Id. 121.

POWER OF LEGISLATURE TO DIMINISH DEBTOR'S HOMESTEAD RIGHT.—The converse question has arisen whether the legislature may reduce the amount of a debtor's homestead so as to relieve a portion of it from the exemption, and subject it to debts contracted antecedently; or as it is put by Mr. Thompson (*Homesteads and Exemptions*, sec. 13), "whether a man has, under any circumstances, a constitutional right not to pay his debts, which may not be impaired by subsequent legislation." And it is held that a homestead exemption is not a vested right that cannot be impaired by legislation after it is acquired, but is a mere statutory privilege, depending upon the will of the state, and therefore a law that homestead exemptions shall not extend to debts contracted for the purchase-money of the property may apply to homesteads previously taken out; for the retrospective operation of such a statute is not to diminish but to enlarge the remedy of the creditor, and con-

sequently it does not impair but increases the obligation of the contract; and against this there is no constitutional prohibition: *Harris v. Glenn*, 56 Ga. 94; *Sparger v. Cumpton*, 54 Id. 355; *Allen v. Harley*, 3 S. C. 412. So in Wisconsin it is held, that though the legislature cannot deprive the debtor altogether of his homestead, since the constitution grants him this right in general terms, yet the amount of his homestead may be reduced, for his homestead right in any particular property is not a vested one; and accordingly, laws enlarging the boundaries of cities so as to embrace lands used for agricultural purposes and occupied as homesteads may operate to change such homestead from a rural to an urban homestead, and therefore to reduce its quantity: *Bull v. Conroe*, 13 Wis. 233; *Parker v. King*, 16 Id. 223. See also *Bramble v. Twilley*, 41 Md. 435. A different view is taken in Iowa with regard to the operation of such a statute: *Finley v. Dietrick*, 12 Iowa, 516, and likewise in Texas; but in the latter state for reasons not embracing the constitutional principle herein involved: *Taylor v. Bouloware*, 17 Tex. 74; *Bassett v. Messner*, 30 Id. 604; *Nolan v. Reed*, 38 Id. 425. See also *Ragland v. Rogers*, 34 Id. 617; S. C., 42 Id. 422; *Iken v. Olenick*, 42 Id. 196; *Sarahas v. Fenlon*, 5 Kan. 592.

RESTRAINT ON ALIENATION, CONSTITUTIONALITY OF. — A statute restraining the alienation of the homestead without the consent of the wife does not impair the obligation of contracts when applied to mortgages made after its passage to secure debts contracted before its passage, and such mortgage may be void under such statute for the failure of the wife to join therein; for the statute does not withdraw any property from execution, and the creditors have the same remedies against the property of the debtor that they had before: *Kennedy v. Stacey*, 57 Tex. 220. But in Nevada, where the constitution provides that the homestead "shall be exempt from forced sale under any process of law, and shall not be alienated without the joint consent of husband and wife, . . . provided the provisions of this section shall not apply to any process of law obtained by virtue of a lien given by the consent of both husband and wife," etc., it was held that a statute providing that no valid mortgage for the purpose of securing a lien or indebtedness could be made by the husband and wife was in conflict with this provision and void: *Dunker v. Chedie*, 4 Nev. 378. Of this decision Mr. Thompson says (Homesteads and Exemptions, sec. 466): "This conclusion seems unsound. The enacting of exemption laws is manifestly within the general power of every legislature, unless restrained by the written constitution; and the language of the constitution of Nevada does not seem to imply a restraint on the legislature against making the exemption more effective than the constitutional convention had seen fit to do." But a statute authorizing a sale or encumbrance of the homestead for purposes other than those enumerated in the constitutional provision creating the homestead exemption has been held to be in conflict therewith and void: *Roberts v. Trammell*, 55 Ga. 383.

WHERE STATE CONSTITUTION DEFINES HOMESTEAD IN ANY PARTICULAR, a statute varying the exemption in that respect will be unconstitutional and void. Thus, where the constitution fixes the quantity, value, or duration of a homestead, the legislature cannot increase or diminish the exemption in these particulars: *Martin v. Hughes*, 67 N. C. 296; *Wharton v. Taylor*, 88 Id. 230; *Miller v. Max*, 55 Ala. 322. So if the constitution provides that the homestead shall be exempt from seizure and sale for the payment of all debts, the legislature cannot except from the benefit of the exemption a certain class of debts: *Coleman v. Ballandi*, 22 Minn. 144; *Tuttle v. Strout*, 7 Id. 465; S. C., 82 Am. Dec. 108; *Donaldson v. Volta*, 19 W. Va. 156; *Cumming v. Bloodworth*, 87 N. C. 83.

MISCELLANEOUS. — An act of the legislature prescribing the mode of setting apart a homestead is valid so long as it does not defeat or impair the benefits of the constitutional provision for a homestead: *Uray v. Davenport*, 79 Va. 19. See also *Noble v. Hook*, 24 Cal. 639; *Hawthorne v. Smith*, 3 Nev. 187. There is no express or implied prohibition in the constitution of Virginia against a law authorizing the waiver of the homestead exemption: *Reed v. Union Bank of Winchester*, 29 Gratt. 719. A constitutional provision that an act shall not embrace more than one subject is not violated by including under the title "an act for a homestead exemption" provisions for the exemption of personal property: *Tuttle v. Strout*, 7 Minn. 465; S. C., 82 Am. Dec. 108.

BURNES v. McCUBBIN.

[8 KANSAS, 221.]

BREACH OF COVENANT IN LEASE NOT TO ASSIGN WITHOUT CONSENT OF LESSOR, providing no penalty for the breach, and unconnected with other covenants providing a forfeiture in case of a breach, will not create a forfeiture by implication.

WHERE LEASE IS SILENT AS TO PLACE FOR PAYMENT OF RENT, it will be presumed that the place intended was the place, or at least in the city, where the leased property is situated; and the tenant will not be expected to go out of the state to tender the rent.

SUFFICIENT COMPLIANCE WITH TERMS OF LEASE REQUIRING PAYMENT OF RENT WHEN DUE is shown where it was tendered five days after it became due, and as soon as the lessor, who resided out of the state, and was accustomed to collect the rent, came to the city where the property was situated.

TENDER BY LESSEE BEFORE SUIT OF AMOUNT PAID BY LESSOR FOR TAXES is in compliance with terms of a lease providing that the lessee shall pay all taxes, or refund any taxes paid by the lessor, and saves a forfeiture.

ACTION to recover possession of leased property from the defendant, who was an assignee of the original lessee. The case was submitted on an agreed statement. Judgment was rendered for the defendant; a motion for a new trial was overruled, and the plaintiffs assigned error. The opinion states the case.

Otis and Glick, for the plaintiffs in error.

Bela M. Hughes, for the defendant in error.

By Court, SAFFORD, J. The plaintiffs brought their action against R. S. McCubbin to recover the possession of certain leasehold property in the district court of Atchison County. The cause was tried by the court upon an agreed statement of facts, and judgment rendered for the defendant.

Plaintiffs then moved the court for a new trial, which was refused, and they bring the case here on a petition in error. On the trial below, the plaintiffs contended that the lease by virtue of and under which the property was held had been forfeited: 1. Because it had been assigned without license from the plaintiff; 2. For non-payment of taxes; and 3. Non-payment of rent.

The court found that the lease had not been forfeited for the reasons stated, or either of them, and that the defendant was entitled to the continued possession of the property. Was this finding erroneous? It was stipulated in the lease that the lessee should forfeit the term: 1. If the lessee failed to pay the rent when due; and 2. If the lessee failed to pay taxes and assessments levied upon the property, or to refund the amount of the same to the lessors in case they should pay them.

After this agreement concerning forfeiture of the term, and not connected therewith, there is the further stipulation that the lessee should not assign the lease without the written consent of the lessors. No penalty is expressly provided in case of a breach of this part of the lease, and unless the penalty of forfeiture is held to extend to it by implication, there could have been no intention on the part of the contracting parties to provide one, but to leave the parties to determine their rights in this respect under the law applicable to such cases.

We are not disposed to favor this doctrine of implication, and more especially when applied to those cases where parties have entered into written contracts with express conditions. The rule is, that "when parties have entered into written engagements with expressed stipulations, it is manifestly not desirable to extend them by implication; the presumption is, that having expressed some they have expressed all the conditions by which they intend to be bound under that instrument."

We think that a fair construction of the terms of the contract in this case justified the court below in holding that the parties thereto did not provide a forfeiture of the lease in case the lessee should assign it without consent of the lessors. The authorities sustaining this view are very numerous.

But the plaintiffs claimed that the lease was forfeited on account of non-payment of rent when due and non-payment of assessments and taxes. The agreed statement shows that the rent was due on the first day of July; that the plaintiffs

resided out of the state, having no agent therein; that it was their custom to collect the rent themselves; that on the fifth day of July, that being the first time any of them had been in the city where the property was situated, the defendant tendered to them the installment of rent due on the 1st.

The lease is silent as to the place where the rent should be paid as it became due. It must be presumed, then, that the parties intended it should be paid at the place, or at least in the city, where the leased property was situated. The tenant could not expect to go out of the state to hunt up the lessors and tender the rent. This would be asking too much of him, —in fact, requiring him to attend to that which should be the care of the lessors.

We think that the case most clearly shows that it was the fault of the plaintiffs that the rent was not paid nor offered to be paid until four or five days after it fell due, and that the defendant did pay the rent or offered to pay it on the first opportunity. A substantial compliance with the terms of an agreement or performance of a condition is sufficient, and when the non-performance of a condition by one party is occasioned by the act of the other party, it may be excused.

In respect to the non-payment of taxes and assessments, the case shows that the defendant tendered the amount which had been paid by the lessors on the fifth day of July, and before the commencement of this suit. The lease provides that the lessee shall pay all taxes and assessments or refund to the lessors the amount of the same, if they should be obliged to pay such taxes by reason of the failure of the lessee to do so. It is plain, therefore, that the lessee had the right to refund to the plaintiffs the amount of taxes and assessments paid by them, and thus save himself from the penalty of forfeiture. The defendant did all that the right of the case and the terms of the lease required of him. We are therefore of the opinion that there is no error in the judgment of the court below.

Judgment affirmed.

All the justices concurred.

RIGHT TO ASSIGN IS INCIDENT TO LEASE, and can be defeated only by clear stipulation: *Robinson v. Perry*, 68 Am. Dec. 455; *Garner v. Byard*, 68 Id. 527, and note 529. Equitable relief may be granted against a forfeiture for a breach of a covenant not to assign without license: Note to *Smith v. Mariner*, 68 Id. 86.

IF CONTRACT FAILS TO STATE PLACE WHERE PAYMENT IS TO BE MADE, the law fixes that at the residence of the promisor: *Patterson v. Jones*, 54 Am. Dec. 296.

STATE v. BARNETT.

[3 KANSAS, 250.]

ACT OF STATE LEGISLATURE PROVIDING FOR TRIAL OF OFFENSES UPON INFORMATION is not repugnant to the provision of the United States constitution that "no person shall be held to answer for a capital or other infamous crime unless on presentment or indictment of a grand jury," etc., as this has application to proceedings in the United States courts alone.

INFORMATION NEED NOT ALLEGE THAT ACCUSED HAS HAD PRELIMINARY EXAMINATION or has waived it, as this is not a matter that goes to the merits of the trial, but merely to the regularity of the previous proceedings.

SUFFICIENCY OF INFORMATION MUST BE DETERMINED BY SAME RULES THAT GOVERN INDICTMENTS.

PRECISE TIME OF COMMISSION OF OFFENSE NEED NOT BE STATED IN INDICTMENT if it is shown to have been within the statute of limitations, except when the time is an indispensable ingredient in the offense.

INFORMATION NEED NOT DESCRIBE OFFENSE IN EXACT WORDS OF STATUTE if the meaning of the words used is substantially the same, where it is provided by statute that the words used in a statute to define a public offense need not be strictly pursued, but other words conveying the same meaning may be used.

INFORMATION for robbery. The opinion states the case.

A. L. Williams, for the appellant.

McArthur and Douthitt, for the respondent.

By Court, SAFFORD, J. On the twenty-second day of December, A. D. 1864, an information was filed in the Shawnee County district court against the respondent, charging him with the crime of robbery in the first degree, under section 67 of the criminal act. The record shows that previous to the filing of said information the respondent had been arrested on said charge, brought before a justice of the peace, and after examination had been recognized to appear at the next term of said district court. A transcript of the proceedings before the justice was filed in the district court on the 20th of December, 1864. The proceeding by information was intended to be in accordance with the provisions of an act entitled "An act to abolish grand juries and to provide for the trial of offenses upon information," passed by the legislature of 1864, and approved February 12th: Laws 1864, p. 111.

The body of the information reads as follows: "That George S. Barnett, late of the county of Shawnee, at the county of Shawnee aforesaid, and within the jurisdiction of this court, on the — day of —, A. D. 1864, being then and there

resided out of the state, having no agent therein; that it was their custom to collect the rent themselves; that on the fifth day of July, that being the first time any of them had been in the city where the property was situated, the defendant tendered to them the installment of rent due on the 1st.

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The body of the information reads as follows: "That George S. Barnett, late of the county of Shawnee, at the county of Shawnee aforesaid, and within the jurisdiction of this court, on the — day of —, A. D. 1864, being then and there

armed with an offensive and deadly weapon, to wit, with one pistol commonly called a revolver, in and upon one George P. Roycraft, then and there being, feloniously did make an assault, and him the said George P. Roycraft, in bodily fear and danger of his life, then and there feloniously did put, and one mare of the value of one hundred and twenty-five dollars, one saddle of the value of three dollars, and one bridle of the value of twenty-five cents, of the personal property, goods, and chattels of the said George P. Roycraft, from the person, in the presence of and against the will of the said George P. Roycraft, then and there, feloniously did take, with intent in so doing, him the said George P. Roycraft, then and there to rob," *contra forma*, etc., which was verified by the oath of the said George P. Roycraft.

At the May term of said court the respondent appeared, and by his counsel moved the court to quash the information for the following reasons: "1. Because the law authorizing the filing of said information is in conflict with the fifth article of amendments to the constitution of the United States; 2. The court had no jurisdiction of the offense, for the reason that it is not alleged in the information that the accused had had a preliminary examination, was a fugitive from justice, or had waived examination; 3. The offense was not alleged to have been committed on a day certain, but generally in the year 1864; 4. The information is informal and insufficient, and does not charge any public offense known to the statutes of Kansas.

The court sustained the motion. The appellant excepted, and brings the case here for review.

The several grounds for quashing the information will be considered in their order.

1. Article 5 of the amendments to the constitution of the United States provides that "no person shall be held to answer for a capital or other infamous crime unless on presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia when in actual service in time of war or public danger."

It has been held by the highest judicial authority that this provision has no application to other than proceedings in the United States courts. In the case of *Barron v. Mayor and City Council of Baltimore*, 7 Pet. 243, Chief Justice Marshall, delivering the opinion of the court, said: "The constitution was ordained and established by the people of the United

States for themselves, for their own government, and not for the government of the individual states. Each state established a constitution for itself, and in that constitution provided such limitations and restrictions on the powers of its particular government as its judgment dictated. The people of the United States framed such a government for the United States as they supposed best adapted to their situation and best calculated to promote their interests. The powers they conferred upon their government were to be exercised by itself, and the limitations of power, if expressed in general terms, are naturally, and we think necessarily, applicable to the government created by the instrument. They are limitations of power granted in the instrument itself, not of distinct governments formed by different persons and for different purposes. If these propositions be correct, the fifth amendment must be understood as restraining the power of the general government, not applicable to the states. . . .

"These amendments contain no expression indicating an intention to apply them to the state governments. This court cannot so apply them.

"We are of opinion that the provision in the fifth amendment, declaring, etc., is intended solely as a limitation on the power of the government of the United States, and is not applicable to the legislation of the states."

There are other authorities holding the same doctrine, but it is unnecessary to refer to them. The above case seems to be a leading one, and is entirely satisfactory.

It follows, therefore, that there is no repugnancy between the act of the legislature providing for the trial of offenses upon information and this amendment of the constitution of the United States. It was competent for the legislature to pass such a law, and it is binding upon the courts.

2. The second objection is based upon the fact that the information does not show on its face that the defendant had a preliminary examination, or had waived such examination, or was a fugitive from justice, etc. The law is as follows: "No information shall be filed against any person for any offense until such person shall have had a preliminary examination therefor as provided by law, before a justice of the peace or other examining magistrate or officer, unless such person shall waive his right to such examination; provided, however, that information shall be filed without such examination against fugitives from justice. Any fugitive from justice against

whom an information may be filed may be demanded by the governor of this state of the executive authority of any other state or territory, or of any foreign government, in the same manner, and the same proceedings may be had thereon as provided by law in like cases of demand upon indictment filed. And provided further, that the district judge may, upon information or affidavits with him filed of the commission of crime, require the prosecuting attorney to prosecute any criminal by information for such crime, and may compel, by attachment, fine, or imprisonment, a compliance with this section": Laws of 1864, sec. 8, c. 64.

It is not doubted that a defendant may insist upon his right to a preliminary examination before he can be called upon to answer the information, unless he shall come within the description mentioned in the provisional clauses of this section, which is not pretended in this case, and if he has not had such examination, nor waived it, he may raise the question by plea setting up such fact. But we do not think it necessary that the information should allege that the accused had had a preliminary examination or had waived it. This is not a matter which goes to the merits of the trial, but to the regularity of the previous proceedings: *Washburn v. People*, 10 Mich. 383.

It will not be contended that an indictment would be bad for failing to allege that the grand jury who found it was composed of fifteen competent jurors, or that twelve of them concurred in the finding (sections 57 and 77), or that the grand jury were impaneled, sworn, or charged, or any other fact necessary to the legal constitution of that body. These are preliminary matters that need not be alleged or proven. What good reason can there be urged in favor of requiring an information to set out the fact of an examination which is preliminary only, and need not be proven on the trial?

But the information as to its sufficiency must be determined by the same rules that have heretofore governed and now govern in cases of indictment. An indictment cannot be quashed on account of any objection like that under consideration (section 96), nor can an information.

3. But it is objected that the information should have alleged the month and the day on which the crime was charged to have been committed.

The rule is well settled that it is not requisite that the precise time of the commission of an offense shall be stated in

the indictment. But it is sufficient if shown to have been within the statute of limitations, except when the time is an indispensable ingredient in the offense: See also *Crim. Proc.*, sec. 91.

The offense charged in the information does not come within the statute of limitations. It is therefore sufficient.

4. It is contended that the information does not charge a public offense. Section 94, criminal procedure, provides that words used in the statute to define a public offense need not be strictly pursued, but other words conveying the same meaning may be used.

The statute upon which the charge in this case was based is as follows: "Every person who shall be convicted of feloniously taking the property of another from his person or in his presence and against his will, by violence to his person or by putting him in fear of some immediate injury to his person, shall," etc.: See *Crimes and Punishments*, sec. 67. It is true that the information does not describe the offense in the exact words of the statute (see above), but the meaning of the words used is substantially the same with that of the words of the statute.

This being true, the objection is merely technical, and the rule laid down in the statute requires that technical errors, or defects or exceptions which do not affect the substantial rights of the parties, shall be disregarded.

The judgment of the district court quashing the information in this cause is reversed, and the cause remanded, with instructions to overrule the motion to quash.

All the justices concurred.

CERTAINTY REQUISITE IN STATING TIME IN INDICTMENT: See *Conner v. State*, 71 Am. Dec. 184, and note 189; *Commonwealth v. McLoon*, 66 Id. 354, and note 355; *Commonwealth v. Hutton*, 66 Id. 352, and note 353. The principal case is cited to the point that where an information for murder alleges that the offense was committed "on or about the eleventh day of August, 1882," the words "or about," in view of the provisions of the criminal code of Kansas, may be treated as surplusage, and the averment in the information as to time is sufficiently certain and specific: *State v. Harp*, 31 Kan. 498; and that where an information charges in the past tense that an offense has been committed, but names a date subsequent to the date of the information, the court may permit an amendment so as to place the date prior to that of the information without trespassing upon the substantial rights of the defendant: *State v. Cooper*, 31 Id. 508.

INDICTMENT CHARGING OFFENSE IN LANGUAGE OF STATUTE IS SUFFICIENT: *Parkinson v. State*, 74 Am. Dec. 522; where the language of the statute suffi-

ciently describes the offense: *Sarah v. State*, 61 Id. 544, and note 552; and if it charges the offense in equivalent words it is sufficient: *Ben v. State*, 58 Id. 234. The principal case is cited to these points in *State v. Foster*, 30 Kan. 366; *State v. Beverlin*, 30 Id. 613.

INFORMATION MUST POSSESS SAME CERTAINTY AND TECHNICAL PRECISION that are required in an indictment: *Donnelly v. People*, 52 Am. Dec. 459.

INFORMATION NEED NOT SHOW THAT PRELIMINARY EXAMINATION HAS BEEN HELD, not that there is legal cause for omitting the same: *State v. Finley*, 6 Kan. 370, citing the principal case.

AMENDMENT TO UNITED STATES CONSTITUTION CONCERNING JURY TRIAL does not apply to suits in state courts: *Lee v. Tillotson*, 35 Am. Dec. 624.

MEAGHER v. MORGAN.

[8 KANSAS, 572.]

COMMON COUNTS FOR GOODS SOLD AND DELIVERED, WORK AND LABOR DONE, money had and received, etc., are sufficient under the code, as they were under the practice before the code; and if the opposing party objects to this form of pleading, he may under the code move to have it made more specific.

ANY OBJECTIONS TO COMMON COUNTS UNDER CODE ON ACCOUNT OF INDEFINITENESS or uncertainty are waived by proceeding to trial.

COMMON COUNTS MAY BE PLEADED IN COUNTERCLAIM UNDER CODE.

COUNTERCLAIM of defendant was as follows: "3. And for a further and third defense the said defendant alleges, that at the time of the commencement of this action the said plaintiff was indebted to this defendant in [a sum named], for the work and services of defendant before then done and performed for said plaintiff at his request; also for the further sum of [stating it], paid, laid out, and expended by defendant for said plaintiff at his request; also in the further sum of [stating it], for so much money before that time had and received by said plaintiff to and for his use; and the defendant alleges that the said plaintiff, although often requested, has not paid the several sums of money or either of them or any part thereof, but the same is and now remains wholly unpaid, wherefore," etc. The plaintiff objected to the introduction of any evidence in support of this defense, and the court sustained his objection. Verdict for the plaintiff, motion for a new trial overruled, and the defendant assigns error.

Hemingray and Gambell, for the plaintiff in error.

Ludlum and Wheat, for the defendant in error.

By Court, SAFFORD, J. The principal question presented by the record in this case is, whether or no the common counts for goods sold and delivered, work and labor done, money had and received, etc., when set out in a pleading, under the code, contain each in itself facts sufficient to constitute a cause of action or grounds of defense.

We are of the opinion that this manner of pleading is sufficient under the code, as it was under the practice before the code. To illustrate, take the plea objected to in this case. It alleges an indebtedness of the plaintiff to the defendant at the commencement of the suit, and also states the facts out of which it arose. Then follow allegations of demand, non-payment, and prayer for judgment. These allegations, if established by proof, would most certainly show a right to recover, and this is all the code requires. But if the opposing party objected to the plea in this form, he could, under the code, move to have it made more specific (section 128), and failing to avail himself of this privilege, he certainly ought not to be permitted to deprive the other party of the benefit of his defense.

In this case the plaintiff objected to any testimony being given by the defendant under his third ground of defense, because it was stated in the form of the common counts, and the court sustained the ruling. We think the court erred in so doing. The testimony offered should have gone to the jury, and the more especially since the plaintiff had interposed no objection at all to the plea, but had replied to it and entered upon the trial. Holding, as we do, that such plea was sufficient, the plaintiff waived any objection he might have had to it on account of indefiniteness or uncertainty by proceeding as he did.

The judgment of the district court is reversed, and the cause remanded, with instructions to sustain the motion for a new trial.

All the justices concurred.

COMMON COUNTS, HOW FAR ALLOWABLE UNDER CODE SYSTEM OF PLEADING: *Allen v. Patterson*, 57 Am. Dec. 542, and note 544-550, treating this subject. The principal case is affirmed and followed in *Clark v. Fenaky*, 3 Kan. 389. The common counts are pleadable under the code, yet if the defendant wishes to take advantage of any want of certainty, precision, definiteness, or consistency in the allegations, he may, by motion, challenge the petition, and compel it to be amended so as to be definite and certain: *Water*

Power Co. v. McMurray, 24 Id. 66; *Barons v. Brown*, 25 Id. 411. And in general, if the allegations in the petition are in any manner indefinite and uncertain, application must be made to compel the plaintiff to make his petition definite and certain by amendment, otherwise the objection is waived; *Hannibal etc. R. R. Co. v. Fox*, 31 Id. 599. An allegation in a petition that the plaintiff is the owner of certain lands, and that the same were not subject to taxation for a given year, will be sufficient as statements of facts against a demurrer, however much they may be liable to attack by motion: *L. L. & G. R. R. Co. v. Leahy*, 12 Id. 125. The foregoing cases cite the principal cases.

CASES
IN THE
COURT OF APPEALS
OF
KENTUCKY.

PLUMMER *v.* NEWDIGATE.

[2 DUVALL, J.]

FACT THAT HORSE IS BRANDED WITH LETTERS "U. S." is not *per se* proof of title in the United States.

ACTION WILL LIE FOR BREACH OF IMPLIED WARRANTY OF TITLE TO HORSE IN VENDOR'S POSSESSION without a judicial eviction, as required in express warranties; but to entitle the plaintiff to recover, the proof of breach should be peculiarly satisfactory.

EX PARTE ACT OF MILITARY OFFICER IN SEIZING HORSE CLAIMED TO BELONG TO UNITED STATES can have no effect on the question of ownership without strong proof that his act was right.

THE opinion states the case.

By Court, ROBERTSON, J. On an implied warranty of the title of a horse sold by the appellant to the appellee for eighty dollars, paid at the time of the sale, this suit was brought, and verdict and judgment were rendered for the sum so paid.

The petition charged that after the appellee bought the horse the federal brand "U. S." was discovered on its shoulder, in consequence of which a provost-marshal took the horse from the plaintiff, and that consequently the appellant had no title. There is no direct allegation that the horse was the property of the United States.

The appellant filed a demurrer to the petition, and also an answer, insisting that his title was good. The record does not show any judgment on the demurrer.

On the trial witnesses testified to the following facts: 1. That one Richards, in Rowan County, holding the horse as his own,

had sold it to Hill, and that Hill afterwards sold it to the appellant, in Fleming County; 2. That the horse, being gaunt and having "a cavalry lope," had been examined while in the possession of Richards, and also while in the possession of the appellant, to ascertain whether it had ever been in the service of the United States, but that no federal brand had been discovered; 3. That the appellee, professing to have taken the horse with other horses to Cincinnati for sale, and that he was there informed by a federal officer that it had the federal brand, tendered it back to the appellant, and demanded restitution of the price paid, and also ten dollars for expense of the trip; and that appellant proposing to take the horse and refund the price by then paying fifty dollars and residual thirty dollars in a short time, the appellee rejected the offer, not because the whole eighty dollars were not tendered in hand, but only, as must be presumed, because he claimed more; 4. That, after the failure of this negotiation, the appellee told a provost-marshal in Flemingsburg that he had in his possession a horse branded "U. S.," and that thereupon that officer, as he himself testified, finding the brand after close scrutiny, took the horse as the property of the federal government.

On the trial the circuit court virtually instructed the jury that the mere brand, if it existed, was "sufficient evidence" to prove that when the horse was sold to the appellee it was the property of the United States, and not of the appellant; and after verdict, refused a new trial.

On this presentation of the case three questions arise: 1. The sufficiency of the petition on demurrer; 2. The instruction just alluded to; and 3. The effect of the tender.

1. The petition fails to aver title in the United States, but rests on the assumed inference from the obscure brand on the horse; and we cannot admit that, as a deduction of law, that simple fact *per se* proves such title. Stolen horses have been often sold to the government, and no such sale could pass a title without the agency or consent of the owner. Multitudes of horses once the property of the United States, and property branded as such, have been captured by their enemy, and by the laws of war belong to the captors, who may lawfully sell or exchange, and thereby pass a good title to them against the government, whose lost title could be restored only by recapture before such sale or exchange by the captor. Many federal officers have owned horses in their own personal right, and after branding them with the "U. S.," have lost them, or

sold or exchanged them without obliterating that brand, or affixing any counter-brand; and horses may have been branded, and sometimes have been, without legal authority, and without vesting any title in the United States; consequently, the mere allegation of such a brand is not equivalent to an averment of title in the federal government to the horse in this case, nor is such a title a legal deduction from such simple allegation.

We are therefore of the opinion that the demurrer to the petition ought to have been sustained.

2. For the like reasons, and especially under the complexion of this case, the circuit court misled the jury by refusing to instruct that the mere brand was insufficient to prove title in the United States, and thereby virtually instructing them that it was sufficient and *prima facie* conclusive.

Although an action may be maintained for a breach of an implied warranty of title to a horse in the vendor's possession without a judicial eviction, as required in express warranties, yet, to entitle the plaintiff to a recovery without such eviction, the proof of breach should be peculiarly satisfactory. The *ex parte* and impromptu act of the military officer is far from being a judicial decision, and can have no effect in this case without strong proof that his act was right. The proof not being such in this case, the circuit court erred on the instruction, and ought to have decided that, while the unexplained and uncorroborated brand was an admissible circumstance, yet that it alone was not, in such a case and against the opposing circumstances, either conclusive or sufficient; and consequently, also, the verdict was not, in our opinion, authorized by the testimony.

3. But the court ought to have granted a new trial on another ground. The appellee volunteered a surrender of the horse to the provost-marshal, who may otherwise never have taken it, and had no right to do so unless it was then the property of his government. The previous tender of the horse to the appellant was on a condition he was under no obligation to perform; and his tender of the price, not being refused on account of the mode of it, was good; and the appellee's refusal to restore the horse, and his tampering with the provost, may have been and probably was the sole cause of the loss of the horse by both parties. This alone ought, in our judgment, to have defeated the action, unless there had been conclusive proof of title in the United States.

Wherefore the judgment is reversed and the cause remanded for a new trial.

IMPLIED WARRANTY OF TITLE ON SALE OF PERSONAL PROPERTY: *Fawcett v. Osborn*, 83 Am. Dec. 278, and cases collected in note 285.

OBJECT OF COUNTER-BRANDING CATTLE, or in lieu thereof to give written descriptive bill of sale: *Walden v. Murdock*, 83 Am. Dec. 135, and note 142.

ACTION FOR BREACH OF WARRANTY OF TITLE TO PERSONAL PROPERTY: *Strong v. Barnes*, 34 Am. Dec. 684; *Salle v. Light*, 39 Id. 317; and see *Rogers v. Hute*, 54 Id. 300.

CUMMINS v. GRIGGS.

[3 DUVALL, 57.]

SALE OF PROPERTY NOT SUSCEPTIBLE OF DELIVERY, AS GROWING CROP, IS NOT CONSTRUCTIVELY FRAUDULENT as to creditors or subsequent purchasers merely because the seller retained possession, and was to cultivate and deliver it at a stated time.

THE opinion states the case.

By Court, ROBERTSON, J. The only question we shall consider in this case is, whether a field of growing tobacco sold by its producer, Huffman, to the appellee, Griggs, about the 20th of August, 1863, and levied on about thirteen days afterwards by the appellant as an execution creditor of Huffman was subject to sale under the execution.

The purchaser paid for the tobacco on the day of the sale, and the vendor agreed to cut it when matured, and cure it, and was in the ostensible possession of it at the date of the levy. The circuit judge, to whom the law and the facts were submitted, adjudged the title to be in the appellee, Griggs, and we are not prepared to reverse that judgment.

As Huffman agreed to take care of the tobacco, and cut and cure it, and as until that had been done, it was not removable and susceptible of any other than constructive possession, the retention of an apparent possession by the vendor did not, *per se*, make the absolute sale fraudulent as against the appellant as a creditor of the vendor; and we do not feel authorized to impute to the sale a fraudulent intent.

Nor can we admit, as urged by the appellant's counsel, that the sale did not vest in Griggs the immediate title, because something remained to be done by Huffman to save the tobacco. The payment of the price on an unconditional sale constructively passed the title, unless the vendor retained the

possession for the purpose of doing something with the tobacco necessary for ascertaining the value or identifying the thing sold, and therefore necessarily an implied preliminary to the divestiture of the vendor's title. But the parties had fixed the price, and the contract conclusively identified the tobacco sold and paid for. And the sale passed the title to the purchaser, and at his risk, as certainly as the like sale of a horse for a sum paid, but to be fed by the vendor for a month, would have vested the title to it in the purchaser. The only difference in principle between the cases is, that in the case of the horse the retention of the possession by the vendor might have made the absolute sale void as to the vendor's creditors, while the same fact in the case of the immovable growing tobacco would not have been inconsistent with the purchaser's title, and therefore not alone presumptively fraudulent. But so far as the purchaser's title as between himself and his vendor would be concerned, the two cases are in law identical.

We are not satisfied, therefore, that the circuit court erred in deciding that the tobacco was not subject to the appellant's execution.

Wherefore the judgment is affirmed.

GROWING CROPS ARE NOT "GOODS AND CHATTELS," WITHIN MEANING OF STATUTE OF FRAUDS requiring immediate delivery and change of possession: *Bernal v. Hovious*, 79 Am. Dec. 147, and see note 151.

RETENTION OF POSSESSION AS EVIDENCE OF FRAUD in sale of goods: See *Grant v. Lewis*, 80 Am. Dec. 785; *Stevens v. Irwin*, 76 Id. 500, and cases collected in note 504.

THE PRINCIPAL CASE IS CITED to the point stated in the *syllabus*, in *Morton v. Bagon*, 5 Bush, 335.

GRAVES v. TILFORD.

[2 DUVALL, 108.]

LAW IMPLIES, ON SIMPLE ASSIGNMENT OF PROMISSORY NOTE, PROMISE by assignor to refund the consideration of the assignment if the note be not justly demandable, or if by the obligor's insolvency or removal from the jurisdiction within which he resided at the date of the assignment, the assignee, by ordinary diligence, cannot coerce payment.

WHEN PRESENTATION AND SUIT ON NOTE BY ASSIGNEE THEREOF ARE PREVENTED by non-intercourse resulting from war, on maturity of the note, and the war continuing, the assignee may bring action against his assignor upon the assignment.

THE facts are stated in the opinion.

By Court, ROBERTSON, J. On the 4th of March, 1861, Clement Davis, a citizen and resident of the state of Mississippi, gave his promissory note to Carroll and Cobair for \$161, payable on the 1st of November, 1861, at the banking house of Brown and Johnson, at Vicksburg. And on the 27th of April, 1861, William C. Graves, to whom it had been assigned again for \$151.88, assigned it to John B. Tilford, of Lexington, Kentucky. At the same time the said Graves, for the consideration of \$149.15, assigned to the said Tilford another note for \$160, executed by A. C. Daniel, of Mississippi, on the 6th of March, 1861, and payable to James Carroll on the 1st of January, 1862, at the house of Parish and Horns, in the city of New Orleans, and which had been assigned to the said Graves by the payee.

On the 22d of November, 1862, Tilford sued Graves on these notes in two several actions, which were afterwards consolidated. Each petition averred that nothing had ever been paid on either note, and alleged the same facts to show that Graves was then legally liable and suable on the promises implied by his assignment, to wit, that before the notes became presentable, both presentation and suit were prevented by the civil war, which had resulted in total non-intercourse between Kentucky and Mississippi and Louisiana, and the actual and legal occlusion of the courts of those states. On an issue on that matter the circuit court rendered judgment on each note for the amount paid for it by Tilford to Graves. Whether, on these facts, the judgment was right is the only question for our consideration.

A statute of Kentucky having made promissory notes assignable so as to pass the legal title to the assignee, the law as long settled by this court implies, on a second assignment without any special agreement, a promise by the assignor to refund the consideration of the assignment, if the note be not justly demandable, or if, by the obligor's insolvency or removal from the jurisdiction within which he resided at the date of the assignment, the assignee, by ordinary diligence, could not coerce payment; and as a logical sequence, the law implies an undertaking by the assignee to use the required diligence, and a guaranty by the assignor that when the note is presentable for payment, the obligor shall be able to pay, and be liable and suable for the amount of the note.

According to this principle, thus conclusively established, shall the assignee or the assignor lose by the intervention of

military events which, without the fault of either, prevented both presentation and suit when and ever since payment became demandable? It was not possible for the assignee to present either note for payment, or to sue for non-payment, nor could the assignor have done either had he never made an assignment. And the diligence required or expected of the assignee was no more than, standing in the same shoes, to do all the assignor himself could have done had he never bailed the notes. The supervening *status* of the war cut off all commercial intercourse between the citizens of the belligerent parties, and closed the courts of Mississippi and Louisiana against the appellee. And this insuperable obstacle had continued when these suits were brought,—when they appeared to be hopelessly indefinite in duration. Was it the appellee's duty to await all the possible contingencies of this unlimited suspension of all remedy? Had it been ordinary delay, incident to all legal remedy, he would have been obliged to abide its final results, and until he had diligently passed through the ordeal, and still, by proper diligence, failed to make the debt, he could not have maintained an action against the appellant as assignor.

But by extraordinary and inexorable necessity, the obligors became both inaccessible and non-suable; and the debts themselves were subjected to sequestration; and thus the implied guaranty of the assignor had been broken, and thereby his liability to these suits became immediately fixed, whereby he relapsed into the condition of creditor, in which he stood before the assignment, and the assignor was absolved from the duty of doing more or waiting longer.

This court has decided that if the obligor, after the assignment of his note, and before, by ordinary diligence, he could be sued on it, remove beyond the jurisdiction of the state in which he resided at the time of the assignment, the assignee is not bound to follow him, but has instant recourse against the assignor.

According to that construction, or rather illustration, of the contract implied by a simple assignment, the facts pleaded and admitted in this case ought *a fortiori* to dispense with the duty of impossible demand by suit or otherwise, and to entitle the assignee to these actions against the assignor as soon as the debts became due, unless the parties to the assignment apprehended such obstruction, and the assignee should be presumed to have taken on himself all the hazards of its possible and contingent occurrence.

But the price paid, which was the customary percentage on the purchase of ordinary bills, clearly indicates that the assignee neither charged nor received any consideration for the risk of such an extraordinary contingency; and this fact repels all presumption that either party then contemplated any such belligerent outlawry, or actual and prolonged occlusion, as a probable event.

Nor was there sufficient cause for any such apprehension; for, although Mississippi had, just before the execution of the notes, passed an ordinance of secession, and Sumter had been bombarded a few days before the assignment, yet all this portended only a transient insurrection, and did not foreshadow such an incredible and *quasi* international war as, months afterwards, interdicted all commercial intercourse between the antagonist sections, and, as between the citizens of each, closed all the courts.

Nor was such a war either apparent or recognized before August, 1861, when the President issued his proclamation of non-intercourse, and treated the seceding states as belligerents. Until then, intercommunication was kept up between the sections by mail and otherwise; and we have no reason to doubt that, had the notes fallen due before that time, the amount of them might have been collected.

A mere ordinance of secession was only declared insurrection, not war, either in fact or in law; and had the Mississippi ordinance been *per se* war, then the assignment of the notes in Kentucky was without any consideration, either legal or actual, to the assignee, who therefore was entitled to restitution of the value he paid for nothing.

We are therefore of the opinion that the judgment of the circuit court was right. Wherefore it is affirmed.

WANT OF PRESENTMENT OF BILL OF EXCHANGE, WHEN EXCUSED: *Windsor Bank v. Norton*, 56 Am. Dec. 397; *Adams v. Darby*, 75 Id. 115.

LOUISVILLE AND NASHVILLE R. R. Co. v. COLLINS.

[2 DUVALL, 114.]

IN CASE OF CONFLICTING EVIDENCE, ON QUESTION OF NEGLIGENCE, the jury have a right to decide the character of the negligence.

CO-OPERATING NEGLIGENCE OF PLAINTIFF, SUIING FOR INJURY RESULTING FROM GROSS NEGLIGENCE of the defendant, will not exonerate the latter if, by the exercise of proper care on his part, the injury might have been avoided.

RAILROAD COMPANIES ARE LIABLE TO STRANGERS for failure of their agents and employees to exercise ordinary care and skill in operating their trains.

RAILROAD COMPANY IS TO BE REGARDED AS CONSTRUCTIVELY PRESENT through its acting agents, who represent it, within the range of their ordinary employment.

RESPONSIBILITY OF RAILROAD COMPANIES FOR INJURIES RESULTING FROM NEGLIGENCE OF ENGINEERS is graduated by the class of persons injured. As to strangers, ordinary negligence is sufficient; as to subordinate employees associated with the engineer in conducting the cars, the negligence must be gross; but as to employees in a different department of service, unconnected with the running operations, ordinary negligence may be sufficient.

AMONG COMMON LABORERS, RAILROAD COMPANY IS NOT LIABLE TO ANY ONE OF THEM for injuries resulting from the acts or omissions of any other one of the class, although each of the company's employees would be its agent as to strangers.

THE opinion states the case.

By Court, ROBERTSON, J. This appeal presents, for the first time to the appellate court of Kentucky, a new and unsettled question, involving the legal liability of railroad companies for damages resulting to an inferior from the negligence of a superior employee, while engaged in different spheres of employment in the common service of any such corporation.

The appellee, while employed by the Louisville and Nashville Railroad Company as a common laborer, in loading and unloading its burden cars engaged in carrying for its road cross-ties and iron, was required, with a co-laborer of the same class, to assist its engineer in righting, in Bowling Green, Kentucky, a locomotive which seemed to be out of order, and the steam being up, the front wheels jacked, the hind wheels unscotched, the engineer on top, — and the appellee working as ordered beneath, — the engine moved forward and cut off one of the appellee's legs, and that motion being reversed by the engineer, the other leg, also, was cut off.

For that irreparable loss, dooming him to hopeless poverty and dependence, the appellee sued the appellant for tort, and recovered a judgment for five thousand dollars damages, as asserted by the jury.

The appellant denies that its engineer was guilty of culpable negligence, and insists, also, that, as he was competent and trustworthy, it is not responsible to his co-employee for his negligence, however gross.

The circuit court instructed the jury, that if they believed that the accident resulted from the gross negligence of the engineer, the appellant was liable for it in this action.

After full and careful consideration, we are satisfied that the engineer was guilty of some negligence. The degree of it was a question of fact which, on such apparently conflicting testimony, the jury had a right to decide; and whatever deduction may be the most logical and consistent, we are also satisfied that the circumstances, as detailed by all the witnesses, authorized the jury to find that his negligence was "gross"; an elaborate analysis of all the facts would not, therefore, be either useful or pertinent in this opinion.

But the appellant assumes that the appellee's own fault contributed to the catastrophe, and it thereupon insists that the co-operation of even the gross negligence of the engineer will not sustain the action. The assumption is not sufficiently maintained, nor is the conclusion from it altogether unexceptionable or true.

The engineer does testify that he directed the appellee and his associate in the work to "block" the wheels, and says that such a precaution would have prevented the accident; but others who heard all that was said, and saw all that was done, on that occasion, do not corroborate, but, by strong implication, negative his statement of that fact, rather discredited by the incredible omission, and by his failure to see that danger, so imminent in his opinion, was not averted by a security so obvious to him and so easy to them; and his credibility is also impaired by his interest and zeal, and his conduct in hiding himself and abandoning his post in the appellant's service almost immediately after the infliction of the injury on the appellee; and not only may we presume that the appellee, a young and unskilled laborer, was ignorant of the utility of scotching, but feel sure that the engineer either did not advise or direct it, or was guilty of gross negligence in placing him in so much peril under the engine without seeing that its stationary attitude was first secured by blocking, and also in using no means of keeping down the steam or preventing its accumulation, although the appellee was kept under the locomotive more than an hour,—the steam increasing and the wheels unscotched all the time.

But had the appellee been guilty of negligence, nevertheless, the injury might have been avoided by the proper care of the engineer, and is therefore attributable to his gross negligence. In such a case, both principle and preponderating authority seem to decide that such a remediable fault of the person injured should not exonerate the wrong-doer from legal

liability for the damage, which, without gross negligence, he could have prevented, and was as much bound by law to prevent in that as he would have been in any other case.

In running its locomotive and its passenger and burden cars, a railway corporation is required by law to observe at least ordinary care, vigilance, and skill, so far as strangers may be affected by the employment of a motive power so tremendous and destructive as unregulated or carelessly or unskillfully regulated steam; and, as in every class of cases of bailment or trust, the requisite care is proportioned to the danger of neglect and the difficulty of conservative management; ordinary care in many classes of cases might be ordinary neglect, and ordinary neglect might be gross neglect in steam operations on a railway. In all those operations, the invisible corporation, though never actually, is yet always constructively, present through its acting agents, who represent it, and whose acts, within their representative spheres, are its acts. Had the appellee been a stranger, the appellant would, therefore, have been certainly suable and responsible in this action, and we cannot admit that the appellee's relation as an employee in its service should exempt the corporation from that general liability, as it might, perhaps, do by the application of a recent rule adjudged in England, with some exceptions, and echoed, with still more exceptions, by a few American courts. But this anomalous rule, even as sometimes qualified, is, in our opinion, inconsistent with principle, analogy, and public policy, and is unsupported by any good or consistent reason. In the use and control of the engine, the engineer is the chief and governing agent of the corporation, and all his associates in that employment are employees in "a common service." Neither of these subordinates under his control is, as between themselves, an agent of the railway company, and therefore it is not responsible for any damage done by one of them to another while in its service, and so far the British rule has foundation in both reason and analogy, but beyond this it is baseless of any other support than a falsely assumed public policy or implied contract. In the employment and control of his subordinates, the engineer acts as the representative agent of the common superior,—the corporation. They have no authority to control or resist him in his allotted sphere of service, and why, then, should the law imply a contract to trust him alone, and never look to the corporation, as his employer and constituent, for indemnity for damage resulting from his

willful wrongs or grossly negligent omissions? When they engaged to serve under him, perhaps they knew nothing of his trustworthiness or his credit; but they knew that they would serve a corporation, and probably faith in its responsibility and protection induced them to venture into its service, —and this faith may be presumed to include an assurance of safety as well as of pay. Perhaps if they had understood that the corporation would not be responsible for the conduct of its engineer, they would never have risked such service under him. The contract implied by law would, therefore, rather seem to be that the subordinates should look to the corporation, and not its agent alone, for indemnity for loss arising to them from his unskillfulness or culpable negligence.

Nor can we perceive how public policy could be subserved by the irresponsibility of the corporation in such a case. Such exemption, if known, might possibly stimulate the subordinates to a more vigilant observance of the engineer's conduct; but why should they be left to depend on that which could be of little, if any, avail to prevent the unskillfulness or negligence of a superior above their dictation or control?

In undertaking the perilous service, they might be presumed to risk the hazards necessarily incident to their employment; and as they could not expect infallibility in the management of the locomotive and its running train, and as they knew that the most faithful and skillful managers may occasionally lapse into common blunders and ordinary negligence, the law might imply an agreement to risk their possible occurrence. But the corporation being under an implied obligation to provide sound and safe cars and engines, and a competent and faithful engineer, his subordinates cannot reasonably be presumed to expect or to hazard his gross negligence, which borders on fraud and crime; and it seems to us, therefore, that, while the corporation may not be responsible to them for his ordinary negligence, both justice and policy require that it should be held liable for his gross negligence as its chief and controlling agent in the management of its running train. Assurance of protection to this extent not only appears just and reasonable, but, by inspiring more confidence, would enable the corporation to obtain and keep better employees, and at cheaper rates. This doctrine, therefore, instead of its converse, seems to be suggested by reason and commended by policy. But in this respect employees like the appellee, in a distinct and altogether different department of service, stand in an essentially different category.

In their employment, having nothing to do with the cars or the running of them, they, like the corporation's mere wood-choppers, are comparative strangers to the engineer and his running operations, and seem to be entitled to all the security of strangers. They may be presumed to know no more than strangers about the skill or care of the engineer, nor have they any more control over him or connection with his running arrangements or operations. They are, therefore, not, in the essential sense of contradistinctive classification, "in the same service" with the engineer and his running co-operators, who act in a different sphere and constitute a distinct class; consequently, neither of the assumed reasons for the British rule as to employees "in the same service" can be, in any way, consistently applied as between the engineer and such common laborers as the appellee; and the apparent extension of the rule to them may be deemed inadvertent, or not carefully and logically considered with rational discrimination and precision. We therefore can neither feel the rationale, nor acknowledge the authority of the crude and self-contradictory decisions, or loose and incongruous *dicta* referred to on that subject; but to harmonize the law, we must recognize a more congenial principle of normal vitality, and adjudge, as we now do, that the appellee, in his humble and isolated employment, should be treated as a stranger to the engine as a motive power, and if without fault himself, might, like other strangers, recover from the railway corporation for a loss arising from the ordinary negligence of its engineer; but as the jury might possibly have found that he himself had been negligent, the circuit court was right in requiring proof of gross negligence by the engineer, which, in that contingency, would have been necessary to the liability of the appellant.

The only consistent or maintainable principle of the corporation's responsibility is that of agency. *Qui facit per alium, facit per se*. It is therefore responsible for the negligence or unskillfulness of its engineer, as its controlling agent in the management of its locomotives and running cars, and that responsibility is graduated by the classes of persons injured by the engineer's neglect or want of skill,—as to strangers, ordinary negligence is sufficient, as to subordinate employees associated with the engineer in conducting the cars, the negligence must be gross, but as to employees in a different department of service, unconnected with the running opera-

tions, ordinary negligence may be sufficient. Among common laborers, constituting a distinct class, all standing on the same platform of equality and power, and engaged in a merely incidental but independent service, no one of them, as between himself and his co-equals, is the corporation's agent; and therefore it is not, on the principle of agency or otherwise, responsible for damages to one of them resulting from the act or omission of another of them, although each of the company's employees would be its agent as to entire strangers to it.

This is the only doctrine we can recognize as consistent with the enlightened and homogeneous jurisprudence of this clearer day of its ripening maturity; and looking through the mist of the adjudged cases and elementary *dicta*, we can see no other fundamental principle which can mould them into a consistent or abiding form. That principle is the only safe clue to lead the bewildered explorer to the light which shows the sure way of right and proves the true doctrine of American law.

We feel authorized to conclude that the appellant was legally liable to the appellee for the injury done to him by the gross negligence of its engineer; that the court, on the trial, gave to the jury the true and only true law; and that the verdict was authorized by both the law and the fact; and we would overstep the judicial line by interfering with such a verdict in such a case, on the ground of alleged exorbitance, indicating neither passion, partiality, nor prejudice.

Wherefore the judgment is affirmed.

QUESTION OF NEGLIGENCE, BY WHOM DETERMINED: *Zemp v. Wilmington etc. R. R. Co.*, 64 Am. Dec. 763; contributory, when a question for the jury: *McCully v. Clarke*, 80 Id. 584, and note 588; *Farish v. Relgie*, 62 Id. 686, note; *Todd v. Old Colony etc. R. R. Co.*, 83 Id. 679.

CONTRIBUTORY NEGLIGENCE, WHAT IS, AND EFFECT OF: *McCully v. Clarke*, 80 Am. Dec. 584, and note 588; *Freer v. Cameron*, 55 Id. 664, note; *Kerwhacker v. Cleveland etc. R. R. Co.*, 82 Id. 246; *Gahagan v. Boston etc. R. R. Co.*, 79 Id. 724, and note 726.

LIABILITY OF RAILROAD COMPANY TO SERVANT INJURED THROUGH SUPERIOR'S NEGLIGENCE: See *Mad River and Lake Erie R. R. Co. v. Barber*, 67 Am. Dec. 312; *Frasier v. Pennsylvania R. R. Co.*, 80 Id. 467, and note 470.

MASTER IS NOT LIABLE TO SERVANT FOR INJURY CAUSED BY NEGLIGENCE OF CO-SERVANT engaged in the same grade of employment: *Illinois Cent. R. R. Co. v. Cox*, 71 Am. Dec. 298, and note 304; and see *Frasier v. Pennsylvania R. R. Co.*, 80 Id. 467, and note 470.

THE PRINCIPAL CASE IS CITED to the second point stated in the *syllabus*, in *Louisville etc. R. R. Co. v. Mahony*, 7 Bush, 239; it is cited to the point that a railroad corporation is to be regarded as constructively present in all acts

performed by its general agents within the range of their ordinary employment, in *Pittsburgh etc. R. R. Co. v. Ruby*, 38 Ind. 312; to the point that one employee may recover for the gross misconduct of a co-employee, although engaged in the same common service, in *Columbus etc. R. R. Co. v. Froesch*, 68 Ill. 550; and is cited on the question of damages, and also distinguished, in *Louisville etc. R. R. Co. v. Sickings*, 5 Bush, 10.

GOLLIHER v. COMMONWEALTH.

[2 DUVAL, 168.]

WHERE ONE VOLUNTARILY FIRES GUN INTO CROWD WITH FELONIOUS PURPOSE OF KILLING ANOTHER, the unintentional killing, even of his friend, would be murder; but if the firing was accidental and involuntary, it would be manslaughter.

ONE WHO FIRES RECKLESSLY INTO CROWD AND KILLS ANOTHER IS GUILTY OF MURDER, even though he fired without any special purpose.

IT IS ERRONEOUS TO INSTRUCT JURY "that drunkenness can never be received as a ground to excuse or palliate a crime," because, when and how far drunkenness may excuse or palliate must depend on its motives, degree, and effect on the mind.

THE opinion states the facts.

By Court, ROBERTSON, J. George W. Golliher, a soldier in the Thirteenth Kentucky Regiment of Volunteers, being at a precinct in Adair County during an election held in a church, became, with some friends, engaged in an armed conflict with an antagonist party, in which he was disarmed and knocked down, and escaped to the woods; and manifesting an intention to go home, went back for his horse; but before he had mounted the horse to start home, he was informed that his party had triumphed and driven from the ground the adverse party; he then took his gun swung to his saddle, and with it went into the crowd in the church, declaring that he would "kill four d—d rascals"; and after entering shouldered the gun,—the muzzle pointing behind him,—when, almost instantly, it went off and killed Rowe, who was standing near and behind him, and who was one of the friends constituting the party in the previous rencounter.

For that homicide he was indicted, and the jury having found him guilty of murder, the court, overruling a motion for a new trial, sentenced him to be hung.

His appeal to this court rests chiefly on the ground of instructions to the jury alleged to be erroneous and preventive of a fair trial of the facts and the law of the case.

If he had gone into the house for the felonious purpose of killing any person, and had he voluntarily fired his gun for the purpose of executing that malicious design, the killing of his friend Rowe, though unintentional, would nevertheless have been murder. Or had he, without any such special purpose, voluntarily and recklessly fired into the crowd and killed Rowe, or any other person, he would have been guilty of murder. But if, in the first hypothetical case, the firing was accidental and involuntary, he would then have been guilty of manslaughter only. And even if thus carelessly carrying his gun into the crowd without any felonious design, he did not fire it, he would not have been guiltless, but the degree of his guilt would not have been near so high as murder of even intentional homicide; consequently, whatever may be the true phase of the case, he was not guilty of murder, unless he himself voluntarily fired the gun.

Tested by the facts and by the foregoing principles of the criminal law, some of the instructions given for the commonwealth were erroneous, and some others bewildering and misleading.

The third, instructing the jury that if the accused went into the house to kill any person, he was guilty of murder, even though the fatal shot was involuntary or accidental, was clearly wrong.

The fourth, instructing the jury that if the accused went into the house maliciously to kill any person, and the accidental shot resulted from his careless handling of the gun, he was guilty of murder, was equally inconsistent with the law as just herein defined.

And the seventh, instructing the jury that "drunkenness can never be received as a ground to excuse or palliate a crime," was, according to the doctrine recognized by this court in the case of *Smith v. Commonwealth*, 1 Duvall, 224, delusive and erroneous.

Intoxication may stultify and partially demonize its victim, dethroning reason, rousing volcanic passions, and either paralyzing or perverting the will; and therefore, unless brought on for a malicious purpose, it may be, when disabling, entitled to some influence on the questions of malice and free volition. When and how far it should have any such influence must depend on its motive, its degree, and its effect on the mind and the passions. This qualified doctrine seems to us to be dictated by policy and humanity, and sanctioned by reason

and modern authority, and was, accordingly, adjudged to be law in the case just cited.

Golliher, when he entered the church with his gun, was drunk; but why and in what degree does not clearly appear. The peremptory and unqualified instruction on "drunkenness" was therefore erroneous.

The second instruction, assuming that the killing without provocation, though involuntary, was malicious, was evidently abstract, unauthorized, and misleading; and on the like ground, some other instructions were also misleading. The instructions given for the appellant did not correct the errors we have suggested. Thus bewildered, the jury could not be expected to understand the law of the case or know how to apply it to the facts.

Wherefore the judgment is reversed, and the cause remanded for a new trial.

TRUE CRITERION OF MURDER IN FIRST DEGREE IS INTENT TO TAKE LIFE: *Keenan v. Commonwealth*, 84 Am. Dec. 414; and see *Maher v. People*, 81 Id. 781, and note 791; *People v. Potter*, 71 Id. 763; *State v. Johnson*, 74 Id. 321.

KILLING PERSON IN MUTUAL COMBAT BY MEANS OF CONCEALED DEADLY WEAPON is murder: *Price v. State*, 72 Am. Dec. 196.

RIOTER CANNOT BE HELD GUILTY OF MURDER OR MANSLAUGHTER by reason of the accidental killing of an innocent person by those engaged in suppressing the riot: *Commonwealth v. Campbell*, 83 Am. Dec. 705.

THAT VOLUNTARY AND INTENTIONAL DRUNKENNESS IS NEITHER EXCUSE for nor extenuation of crime, see *Carter v. State*, 62 Am. Dec. 539.

ON TRIAL FOR MURDER, PRISONER'S INTOXICATION IS NOT SUCH EXCUSE as will allow a less than ordinarily adequate provocation to palliate the offense, unless it was so great as to render him unable to form a willful, deliberate, and premeditated design to kill, or incapable of judging of his acts and their legitimate consequences: *Keenan v. Commonwealth*, 84 Am. Dec. 414.

MULLIKEN v. WINTER.

[2 DUVALL, 264.]

PURCHASER PRIOR OF EXEMPT PROPERTY — SET-OFF. — A housekeeper, with a family, sold his only cow to enable him to buy one that gave milk, the purchaser knowing at the time the object of the sale. *Held*, that the seller was entitled to recover the whole price of the cow in money from the purchaser, and the latter could not set-off against it any debt he might hold against the former.

THE opinion states the case.

H. Taylor, for the appellant.

Stanton and Throop, and F. L. Cleveland, for the appellee.

By Court, WILLIAMS, J. Mulliken, being a housekeeper, with a family, and having but one cow, and she dry, agreed to sell her to Winter, for the purpose of getting money with which to purchase another cow then giving milk; and this Winter well understood, and agreed to pay the money on delivery of the cow.

The cow was delivered at the weighing scales as agreed, and her weight ascertained, when Winter announced that he did not have the money with him, but would pay it over the same afternoon if Mulliken would call at the neighboring town of Minerva, where he lived. Whereupon Mulliken, after stating the object of the sale and receiving the assurance of payment, agreed that Winter should take the cow.

When Mulliken, a few hours thereafter, called to receive the payment, Winter presented him a note for fifty-four dollars, due the 13th of April, 1865, which he had executed to David Manner, and tendered the remainder of the price in United States legal-tender treasury notes. Whereupon Mulliken sued Winter before the county judge for the price of the cow. The county judge having adjudged that the note was good set-off, gave judgment to Mulliken for \$7.45 and costs, from which he appealed to the circuit court.

Winter confessed the correctness of the judgment of the county judge, and offered to pay it; whereupon the circuit court adjudged the cost of the appeal against Mulliken, and ordered the money tendered in court to be paid over to him, from which he appeals to this court.

By our statute two cows and calves are exempt from execution to every housekeeper with a family, the policy of which is to secure to every family that are keeping house a sufficient subsistence, which is regarded as paramount to the claim of creditors; and such property being exempted anterior to the creation of this debt, constitutes no part of the estate of the debtor relied on by the creditor for its payment, and therefore gives him neither a legal nor moral right to look to such property for payment. And whatever right the head of the family and owner of the property may have to sell and convert it, and should he sell it on credit, however creditors who are entirely innocent of any contrivance to get it so converted may attach such a claim and subject it to the payment of

their claim, still, as virtually decided by this court in *Collett v. Jones*, 7 B. Mon. 586, where the creditor of an insolvent debtor, by his own act, attempts to violate the letter or spirit and objects of the statute in getting such property converted, he will not be permitted to avail himself of his own wrong.

It is apparent in this case that Mulliken would not have sold his only cow but for the purpose of purchasing with the proceeds another cow then giving milk, which would be more beneficial to the family; and this Winter understood, and by his promises induced Mulliken to part with his cow. His subsequent conduct tends to the inference that all these promises were a contrivance on Winter's part to get possession of the cow, and then to speculate by the purchase of this note; so that he, by his own conduct, has been instrumental in depriving Mulliken's family of a right secured them by statute. Besides, it is a violation of his express agreement; and certainly where a party promises to pay the money on delivery of property, in which case no title vests until the payment, and then, by a contrivance and promise, gets possession of the property, the law will not encourage the violation of his agreement by permitting him, in disregard of his undertaking, to purchase in debts to plead as an offset, and all such attempts should be discouraged.

The court should have adjudged against Winter the full price of the cow for the benefit of Mulliken's family, not to be subjected in any manner to any offset or judgment or legal proceeding of Winter on said note.

Should Winter desire, he may have judgment over against Mulliken on said note, but the price of the cow in no manner to be subjected to its payment.

Wherefore the judgment is reversed, with directions to the court below for further proceedings.

THAT PROCEEDS OF SALE OF EXEMPT PROPERTY ARE NOT EXEMPT FROM EXECUTION, see *Knabb v. Drake*, 62 Am. Dec. 352.

EXEMPTION OF COW INCLUDES HEIFER NOT GIVING MILK, WHEN: *Carroll v. Grassie*, 71 Am. Dec. 707; and see *Rochwell v. Hubbell*, 45 Id. 262, note.

EXEMPTION OF ARTICLES NECESSARY TO SUPPORT LIFE: See *Montague v. Richardson*, 63 Am. Dec. 173, and note 176.

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LOCKRIDGE v. BIGGERSTAFF.

[2 DUVALL, 281.]

INJUNCTION, THOUGH ADJUDGED TO HAVE BEEN WRONGFULLY SUED OUT, RELEASES LEVY and discharges the lien created by the levy of an execution.

CREDITOR WHOSE EXECUTION HAS BEEN LEVIED AND THEN ENJOINED should, upon the dissolution of the injunction, take out a new execution.

THE opinion states the case.

S. Turner, for the appellant.

R. M. and W. O. Bradley, for the appellee.

By Court, WILLIAMS, J. In the case of *Keith v. Nelson*, 8 Met. (Ky.) 202, this court held that an injunction arrested the execution of the *fiery facias*, though levied, and released the levy, and discharged the lien created thereby; and this notwithstanding the injunction had been adjudged to be wrongfully sued out; and numerous authorities are referred to in support of this proposition. This being regarded as sound law, the consequence is that Lockridge can derive no benefit from the levy of his first execution on the property in contest, as this execution and levy were stayed by injunction; and that, after the injunction was dissolved, he properly sued out a new execution, instead of a *venditioni exponas*.

And as he had notice before the levy of this execution on the property in contest as the property of H. D. Oldham, that Biggerstaff had purchased it from Oldham long anterior to the issual of his first execution, he can derive no benefit from the levy of either execution, as the property belonged to Biggerstaff, and the levy of the first execution was released by the injunction, and Lockridge had notice previous to the levy of the second execution that the property was Biggerstaff's, and not Oldham's, his execution debtor.

It is not necessary to determine what would have been the effect of the first levy had it not been released by the injunction.

Wherefore the judgment is affirmed.

INJUNCTION TO PREVENT CLOUDING OF TITLE BY EXECUTION SALE: See *Carlin v. Hudson*, 62 Am. Dec. 521, and note 523.

EQUITY MAY BY INJUNCTION STAY PROCEEDINGS AT LAW at any stage thereof: *Pollock v. Gilbert*, 60 Am. Dec. 732.

REMEDY FOR WRONGFULLY CAUSING INJUNCTION TO BE ISSUED: *State v. McGlynn*, 81 Am. Dec. 118.

PHILIPS v. COMMONWEALTH.

[2 DUVALL, 228.]

IN TESTING INSTRUCTIONS GIVEN ON MURDER TRIAL, every deduction which the jury might have been authorized to make from the evidence must be assumed as a fact proved.

PRINCIPLE APPLICABLE TO MUTUAL ENCOUNTER OR AFFRAY WITH DEADLY WEAPONS does not apply to a case in which the first escape from threatened assassination by a determined and persevering enemy probably would not secure the ultimate safety of the accused. In such a case the accused is not required to retreat if he can, but may stand his ground, and will be excused if he kills his assailant.

INSTRUCTION TO JURY ON TRIAL FOR MURDER HELD TO BE ERRONEOUS, given upon a statement of facts set forth in the opinion.

THE opinion states the case

Hooe and Gaither. Hunt, Beck, and Clark, and C. A. Hardin,
for the appellant.

John M. Harlan, attorney-general, for the commonwealth.

By Court, ROBERTSON, J. Convicted and sentenced to be hung for killing, by pistol shots, his neighbor and wife's cousin, Madison Miller, the appellant, Richard Philips, appeals to this court for a reversal of the judgment, because, as he says, he had not a fair trial, the jury being confused and misled by instructions both bewildering and erroneous.

In testing the instructions, every deduction which the jury might have been authorized to make from the testimony must be assumed as a fact proved. Tried by this rule, the following facts characterize the case, as exhibited in the record:—

1. About four weeks before the homicide, Miller, armed with a pistol, went to a field where the appellant and others were working, avowing his purpose to chastise a white boy then and there in the employment, and confided by his father to the care and protection, of the appellant; and the required surrender of the boy being refused, Miller, in a violent rage, pointing his pistol at the appellant, threatened to shoot him; and being, probably, prevented by the presence of others, cursed and denounced him, and asseverated that, wherever he might see him again, he would shoot him.

2. The threat was afterwards, more than once, repeated to other persons, and Miller was once seen watching for the appellant, on the road he was expected daily to travel, and avowed his purpose to kill him

3. Miller was a man of strong passions, unrelenting in re-

sentment, and rather peculiarly bold, reckless, and inflexible in the execution of his avowed purposes.

4. On the day of the homicide the appellant, on horseback, going with his wife and brother to his field with a scythe and cradle on his shoulder, met Miller unexpectedly, and inquiring of him whether he intended then to execute his threat, Miller answered that he did, and put his hand in his pocket, indicating an intention to draw his pistol. Whereupon the appellant charged on him and shot him several times, until he was apparently dead. A rather feeble-minded boy, who was with the appellant and his wife and brother at the time of that fatal meeting, testifies to that conversation and demonstration as the only witness, the wife being incompetent, and the brother being incapacitated by the joint indictment against the appellant and himself, unless the object was to deprive the appellant of his testimony. And although the only remaining witness of the conversation was much confused by severe cross-examination, the jury had a right to believe him, and such belief was therefore hypothetically assumed in some of the instructions

On these facts the circuit court gave several instructions, rather too multifarious to be certainly understood and rightly applied by the jury, and refused some others asked by the appellant's counsel.

In two of the instructions, as given, the court told the jury that if they should believe the substance of the foregoing facts, they ought, nevertheless, to find the appellant guilty of murder, unless they should also be of the opinion that he, when "he fired the first shot, had reasonable ground to believe, and did in good faith believe, that Miller was then about to carry [his] threats into execution, and would do so unless prevented by killing him [Miller], and that he [appellant] had no other apparent means of escape."

The principle assumed in these instructions, as to the duty of escaping, we cannot recognize as either safe, sound, or maintainable as the law of the land. The principle applicable to a mutual rencounter or an affray with deadly weapons does not equally apply to such a case as this, in which the first escape from threatened assassination by a determined and persevering enemy might not, and probably would not, secure the ultimate safety of the doomed victim. The law of self-defense is, in such a case, more comprehensive, conservative, and assuring. Mr. Starkie, in his second volume on evidence

(side page 523), says: "The accused may also show in justification that he committed the act in self-defense. If A manifestly intends to commit a felony on the property or person of B, by violence or surprise, B is not obliged to retreat, and may pursue his adversary till he find himself out of danger; and if, in the conflict, A happened to die, such killing is justifiable; but in the case of mutual conflict, the party, to excuse himself, must show that he retreated as far as he could before he gave the mortal stroke, and that he killed his adversary through mere necessity to avoid immediate death."

This is British law. Why, when properly understood and applied, should it not be, in principle (without now defining the extent of its application), American law? And if the principle illustrated in the first part of the extract be sound, must it not be pre-eminently applicable to continual danger to life, reasonably and actually apprehended from persistent threats?

In such a case, an escape from immediate danger is only momentary, and may be no escape from the danger still impending, and perhaps increased; because running once may induce the assailant to believe that the assailed will never stand and manfully defend himself, and thus embolden him to renew his attacks without apprehension of any resistance perilous to himself. If the party once assailed by an enemy who had threatened to kill him is bound by law to run if he can thereby escape that assault, legal self-defense may become a mockery, and the sacred right itself a shadow. Like the sword of Damocles, the threatened danger is continually impending every moment and everywhere. The threatened man may be waylaid, or otherwise attacked unawares, without the possibility of defense or of escape; and may never, day or night, feel safe, or actually be so, while his enemy lives, who, whenever he may see him, or wherever he can find him, may be anxious and able to kill him. And does either human or divine law require such prolonged agony and peril? Or can the best and most prudent men suicidally forbear to strike for riddance if they have the courage to defend themselves in the only way of secure and lasting escape? Starkie says no, and we too say no. Whether, in such a case, the threatened man, anticipating the attack, may always hunt his enemy and kill him in self-defense, we do not mean to intimate. It is sufficient for this case to decide that if the appellant had reason to apprehend, and did apprehend, that Miller would shoot him

unless he could run away, or shoot Miller first, the law does not require him to run and be shot, perhaps in the back, or afterwards secretly assassinated, but justified his taking Miller's life. And if he believed that Miller was drawing out a pistol to shoot him, the fact afterwards developed that Miller had then no pistol, but was only maneuvering to make him run, cannot make him culpable for doing what he had good reason to believe was necessary for either the immediate or ultimate security of his life.

It is evident that the appellant had not been seeking but rather eluding Miller, whose vindictive passion and bloody purpose seemed to have been not only unjustifiable, but causeless. Did the public interest or the reason of the law require the appellant to continue to skulk and endure the agony of impending death as long as Miller might seek his life? This cannot be. Then why, if the testimony be true, was it his duty, when he met Miller, ignominiously to flee, and thereby prolong and increase his peril? This was not the way to save himself or to "escape" being shot in the dark, at home or abroad, by stealth or surprise, when self-defense would be impossible. And unless he could, by running, have escaped all these continually impending perils, why should the law require him to run? Regard for his own life would not allow it, and as a proper man and prudent citizen he was not bound to do it. And the example of such humiliating and imperiling recreance would do more harm than good to the public security and peace.

We are of the opinion, therefore, that, as hereinbefore indicated, the circuit court radically erred.

Wherefore the judgment of conviction is reversed, and the cause remanded for a new trial, when, if the appellant be guilty, he may be punished justly according to the laws of his country.

INSTRUCTIONS TO JURIES: See *State v. Whit*, 72 Am. Dec. 533, and extended note on subject, 538.

PLEA OF SELF-DEFENSE, WHAT WILL JUSTIFY: *Campbell v. People*, 61 Am. Dec. 49, and note 53; *State v. Ingold*, 67 Id. 283; *Noles v. State*, 62 Id. 711; *Teal v. State*, 68 Id. 482; *Dukes v. State*, 71 Id. 370; *Logue v. Commonwealth*, 80 Id. 481; *Wesley v. State*, 75 Id. 62, and note 69; *State v. Moore*, 83 Id. 159; *State v. Garrett*, 84 Id. 359.

THE PRINCIPAL CASE IS CITED and approved to the second point stated in the syllabus, in *Young v. Commonwealth*, 6 Bush, 320; *Carico v. Commonwealth*, 7 Id. 127, 129, 130; *Holloway v. Commonwealth*, 11 Id. 351; it is in part overruled in *Behannon v. Commonwealth*, 8 Id. 487, 489, where the court says:

"We adhere to the ruling in that case in so far as it decides that the principle of self-defense does not equally apply in cases of mutual rencounters or affrays with deadly weapons and one like this, where the life of the accused has been threatened by a lawless and determined enemy, when he has actually been assaulted with deadly weapons and compelled to flee, after which his enemy threatens to take his life whenever and wherever he may find him. But one so circumstanced has not the right to kill such enemy unless he believes, and has reasonable grounds to believe, that the presence of his enemy puts his life in immediate peril, and that he can escape such peril in no other way."

WITHERSPOON v. FARMERS' BANK.

[2 DUVALL, 496.]

CAPTURE OF TOWN IS NOT UNLAWFUL ACT IN MILITARY SENSE, but is allowable by the laws of war between antagonistic parties recognized as belligerents.

LIABILITY OF SOLDIER FOR WRONGFUL CAPTURE. — An officer in Morgan's Confederate army aided in the capture of a town, but neither counseled nor aided the robbery of a bank in the town by a portion of the command: *Held* that he was not liable in damages to the bank for such robbery.

THE opinion states the case.

T. N. Lindsey, for the appellant.

Harlan and Harlan, for the appellee.

By Court, ROBERTSON, J. On the 8th of June, 1864, General John Morgan, at the head of a Confederate army, captured Mount Sterling, Kentucky, and the Federal forces stationed there to defend it. On the morning of the capture, and immediately after the capitulation, one of his subaltern officers and a small band of his soldiers forcibly entered the vault of the Mount Sterling branch of the Farmers' Bank of Kentucky, and abstracted about sixty thousand dollars, none of which was ever restored. Whether this spoliation was ordered or sanctioned by the general, or what was done with the money, does not appear.

The appellant, as a lieutenant in the invading army, aided in the capture of the town; but there is no evidence tending to prove that he in any way counseled, aided, or even approved the robbery of the bank. On the contrary, as far as such a negative is susceptible of proof, facts proved by several witnesses conduce strongly to the presumption that he had no sort of agency in the robbery, either before or after its perpetration.

But for imputed participation in the outrage, the mother bank, now appellee, sued him for damages, and as he was then non-resident in Kentucky, proceeded against him by a warning order, and without answer procured a judgment for \$59,057.33, and an order for the sale of a tract of land and other property which it had attached. After the sale, but before a confirmation of the report of it, the appellant filed an answer denying any participation in the robbery before or after, direct or indirect, openly or covertly.

On the issue thus formed the testimony just alluded to was taken.

On the final hearing of the case thus opened, the circuit court affirmed its former judgment, and confirmed the sale.

The appellant was certainly not legally liable for this flagrant wrong, unless every other soldier with him in the battle was individually responsible for it. And as no other appears or can be imagined, we may presume that the circuit court assumed that comprehensive ground. But according to the record, this is indefensible. Had it appeared that such spoliation was one of the objects of Morgan's invasion of Kentucky, then he and his whole army, jointly and severally, would have been guilty, and responsible, not only to the indignant judgment of the civilized world, but to the laws of their country, so far as such a savage act might be condemned as an abuse of belligerent right. But whatever may have been the fact, there is no proof of any such wrongful purpose. On the contrary, there is some evidence that, on entering Kentucky, an order was announced interdicting all such outrages. And if, nevertheless, Morgan had any such unlawful design, there is no evidence tending, in the slightest degree, to show that the appellant knew or approved it.

It is true, as argued for the appellee, that the appellant, by aiding in the capture of Mount Sterling, helped to "pave the way" to the robbery. But it is not true, as also argued, that the capture of the town itself was, in the military sense, an unlawful act. It was not forbidden, but allowed, by the laws of war between antagonistic parties recognized as belligerents. It may be admitted that, had there been no capture of the town, there would have been no robbery of the bank. And so, likewise, had there been no unconstitutional secession, there would have been no rebellion; and had there been no civil war, there would have been no such plunder of the bank. Hence the assumed and perverted principle which would

make the appellant responsible would hold equally liable all the agitators who excited the rebellion or helped its cause in either a civil or military capacity.

This is too much. But the logical argument, *ex absurdo*, is a satisfactory refutation of the only plea urged in support of the judgment.

The outrage was great, and ought to be punished; the loss was heavy, and ought to be repaired. But we cannot see how or why the appellant, uncivic and reprehensible as his recreation from the Union cause may have been, should be made the victim for a wrong in which he took no more part than every other rebel in Morgan's army or elsewhere.

Wherefore the judgment of the circuit court is reversed, and the cause remanded, with instructions to quash the sale and dismiss the appellee's petition.

LIABILITY OF SOLDIERS FOR WRONGFUL CAPTURE, ETC.: See the note to *Christian County Court v. Rankin*, *post*, p. 508.

EFFECT OF WAR ON RIGHTS OF ALIENS: See *Molynous v. Seymour*, 76 Am. Dec. 662, and note 667.

CHRISTIAN COUNTY COURT v. RANKIN.

[2 DUVALL, 502.]

PLEA OF BELLIGERENT RIGHT WILL NOT JUSTIFY CAPTURE OR DESTRUCTION of such public property as court-houses, churches, and property of literary institutions, unless used for some military purpose by the captor's enemy

SOLDIERS CANNOT JUSTIFY ACT NOT LEGITIMATELY ONE OF WAR by showing that they did it by command of their superior officers.

IN WAR BETWEEN INDEPENDENT SOVEREIGNTIES, ABUSE OF BELLIGERENT POWER by soldiers in the service of their nation cannot be inquired into by the judiciary of the other, but this rule does not apply to a domestic war between the people of the same nation.

KENTUCKY STATUTE, ACT OF 1864, PROVIDING "CIVIL REMEDY FOR INJURIES DONE BY DISLOYAL PERSONS," does not, so far as it applies to soldiers, intentionally or constitutionally extend to belligerent rights, but embraces only trespasses and spoliations committed by them in their own individual right and for their own benefit.

ACTION FOR UNLAWFUL BURNING OF COURT-HOUSE may be maintained in the name of the county.

The opinion states the case.

Landes and Ritter, and H. A. Phelps, for the appellant.

J. W. McPherson and L. W. Trafton, for the appellees.

By Court, ROBERTSON, J. The court-house of Christian County having been burnt down by a band of Confederate soldiers under the command of General Lyon, the appellant sued the appellees for damages, alleging that they, as Confederate soldiers, aided in the combustion.

The appellees demurred to the petition on the specific ground that its allegations are insufficient for the maintenance of the action. The circuit court sustained the demurrer, and rejected five successive amendments offered for substituting other plaintiffs, among which were the county of Christian in one amendment, and the commonwealth of Kentucky and said county, for the use of the latter, in another amendment.

As the demurrer waived all objection to the character of the plaintiff, we could not affirm the judgment if the petition show a maintainable cause of action in any name, even though the county of Christian, as a quasi-corporation owning the court-house, or the commonwealth, incidentally interested for the use of the county, would have been a more appropriate plaintiff: Code of Practice, sec. 121; and *Lee v. Waller*, 3 Met.

But, to avoid all ultimate hazard, the circuit court ought to have admitted one of the two amendments just indicated as proper. None of the rejected amendments would have changed the identity of the cause of action, or the essential character of the action, or the amount or destination of the damages, which, in whatever name recovered, would go to the county, to be appropriated to its use by its county court.

But the personal liability of the appellees as trespassers, and the jurisdiction of the court to enforce it by civil remedy, are radical questions, both new and rather difficult.

The petition constructively imports that in assisting to destroy the court-house the appellees acted as belligerents under the supposed license of the assumed confederacy, and for its cause alone, and not for their own individual benefit. And if it were a lawful act of belligerence, they are not responsible for damages; for the rebellion having matured into a civil war, in which the organized rebels were recognized, at home and abroad, as belligerents, they had, while the war continued, all the military rights, as to means and modes of prosecuting it, which the laws of nations concede to international belligerents. Among those lawful means conceded by the voluntary law of nations are the destruction and capture of public and

private property for benefiting the captor or weakening the enemy. But this right is not unlimited. The modern law of nations, not authoritatively settled and wisely recognized throughout the civilized world, excepts from capture or destruction such public property as court-houses, churches, and property of literary institutions, unless used for some military purpose by the captor's enemy. In support of this position, the authorities are so abundant and concurrent as to dispense with any particular citations.

In the absence of any proof or allegation to the contrary, the court-house in this case should be *prima facie* presumed to have been, according to its dedication, kept and used for civil purposes exclusively; and therefore, this, though not explicitly alleged in the petition, should be held as admitted by the demurrer. If, at the time of the burning, it was used for any military purpose, such as Federal barracks or barricades, or the repository of Federal arms or munitions, or was occupied by Federal troops as a temporary fortress, the destruction of it might have been a lawful belligerent act. But if any of these justifying facts existed, they ought to have been pleaded. And consequently, considering, as we now must, only the sufficiency of the petition, we adjudge that it shows that the burning of the court-house was unlawful and indefensible on the plea of belligerent right. The petition does not clearly show whether the wrongful act was done spontaneously by the burners or under an order by a superior officer. But this is not essential, because an unlawful act cannot be justified by an unlawful authority or command to do it. In this both principle and authority concur: *Little v. Barreme*, 2 Cranch, 170; *Mitchell v. Harmony*, 13 How. 115.

Then, according to the legal effect of the petition, the appellees were trespassers, and are personally responsible for the wanton damage they did.

And why may not that responsibility be enforced by the judiciary of the place where the wrong was done?

Had the war been international, between two independent sovereignties, it might be true, as argued, that for an unlawful abuse of belligerent power by the appellees in the cause of their nation, the only proper remedy would have been an appeal to their government. But the reason for that rule does not apply to a domestic war between the people of the same nation, who have but one and the same national government.

In this case the citizens of the Confederate States were still,

nevertheless, citizens of the "United States," whose government had never recognized the pseudo "Confederacy" as a sovereign nationality, and an appeal to it by our only national government for redress for wrongs done by its soldiers would have been not only necessary and unavailing, but also a suicidal acknowledgment of its national sovereignty and independence; and now, especially, since the war has closed and stripped the revolting states of all pretense of local nationality and independence, there is certainly no "Confederacy" to which our government, which is also their government, could appeal for acknowledgment and indemnity.

Consequently, there is either no remedy for the wrong or it must be an action against the persons who did the wrong. There must be a remedy, and of that remedy the state judiciary has jurisdiction. There is nothing in the federal constitution which deprives a state court of power to decide a question of international law incidentally involved in a case over which it has jurisdiction; and for every wrong the common law of Kentucky provides an adequate remedy. To sustain this action, therefore, it is not necessary to invoke any statutory aid.

And we are of the opinion, moreover, that the act of February 22, 1864, providing "a civil remedy for injuries done by disloyal persons" (Session Acts, pp. 120, 121), does not, so far as it applies to "soldiers," intentionally or constitutionally extend to belligerent acts, but embraces only trespasses and spoiliations committed by soldiers in their own individual right and for their own personal benefit.

Wherefore, on international and common-law principles, we adjudge that the petition in this case sets forth a good cause of action against the appellees, and that, consequently, the judgment of the circuit court on the demurrer was erroneous. That judgment is therefore reversed, and the cause remanded, with instructions to overrule the demurrer and admit the amendment making the county of Christian a plaintiff.

SOLDIER IS NOT BOUND TO OBEY HIS SOVEREIGN by going into a neighboring nation in time of peace, and there committing an unlawful act: *People v. McLeod*, 37 Am. Dec. 323, and note 366; see *Witherspoon v. Farmers' Bank*, *ante*, p. 503.

PERSON CONCERNED IN CAPTURE OF AMERICAN VESSEL, under color of the insurgent military authority of a foreign province, will be responsible to the owner of the vessel for the damages sustained by the capture, there being no evidence of the recognition of the government of the United States

of a state of war as existing between the insurgent province and the power to which it belonged: *Diamond v. Petit*, 46 Am. Dec. 356.

LIABILITY OF SOLDIERS FOR DESTROYING PROPERTY DURING WAR.—The right of one belligerent power, not only to coerce the other by direct force, but also to cripple its resources by the seizure or destruction of its property, is declared to be a necessary result of a state of war: *Prize Cases*, 2 Black, 635, 671; and see *Dow v. Johnson*, 100 U. S. 158, 167. And under the law of nations, a belligerent is always permitted to destroy the property of the enemy, when its destruction is a necessary concomitant of ordinary military action. On the other hand, destruction is always illegitimate when no military end is served, as when churches or public buildings not used for some military purpose are wantonly devastated: See Hall's International Law, 460; *Bell v. Louisville etc. R. R. Co.*, 1 Bush, 404, and opinion in the principal case. So parties to a civil war usually concede to each other belligerent rights, as in the case of an international war. The contest, though originating in rebellion, must, when it assumes such proportions as to be justly denominated civil war, be recognized as entitling both parties to the rights of war, just as much as if it was waged between two independent nations: *Prize Cases*, 2 Black, 669; *Ferguson v. Loar*, 5 Bush, 691; *Ford v. Surget*, 97 U. S. 594, 611. Each party to such a contest is entitled to the same right of capture or destruction of enemy's property, and when either the capture or destruction of property by one is lawful, it is equally lawful by the other; and if unlawful by one, it would be equally so by the other: *Bell v. Louisville etc. R. R. Co.*, 1 Bush, 404; and see *Jones v. Williams*, 41 Tex. 390; *Smith v. Braxelton*, 1 Heisk. 44; S. C., 2 Am. Rep. 678. Thus during the war between the Confederate States and the United States, cotton was destroyed by order of the county provost-marshal, acting in obedience to the orders of the Confederate commanding general, and it was held by the supreme court of Mississippi that the agent who obeyed these orders was not liable in an action by the owner to recover the value of the property: *Ford v. Surget*, 46 Miss. 130; S. C. affirmed, 97 U. S. 594. Cotton during that war was regarded by both belligerents as the subject of seizure and condemnation, and as falling within that class of property which a belligerent might destroy to prevent its falling into the hands of the enemy and augmenting his resources: *Id.*; and see *Mrs. Alexander's Cotton*, 2 Wall. 420; *Haycraft v. United States*, 22 Id. 81; *Young v. United States*, 97 U. S. 39. So it was held by the court of appeals of Kentucky that one who, acting under the orders of a Confederate general, burned the cars of a railroad, was not liable in a civil action for damages: *Bell v. Louisville etc. R. R. Co.*, 1 Bush, 406. So it was held by the same court that the capture of horses for the public use of the Confederate army under military authority, express or implied, however wrongful in fact, was excusable as a lawful exercise of a belligerent right: *Price v. Poynter*, 1 Id. 387. Compare *Beck v. Ingram*, 1 Id. 355; *Sellaris v. Zomes*, 5 Id. 90. And it is well-settled doctrine that private property in time of war or of immediate and impending public danger may be impressed into the public service, or may be seized and appropriated to the public use, or may even be destroyed without the consent of the owner, and without antecedent compensation: *Taylor v. Nashville Railroad*, 6 Cold. 646; *Drehman v. Stifel*, 41 Mo. 184; *Wellman v. Wickerman*, 44 Id. 484; *Mitchell v. Harmony*, 13 How. 115; but the public danger must be imminent and impending, and the emergency in the public service must be extreme and imperative, and such as will not admit of delay or a resort to any other source of supply: *Id.*; *Farmer v. Lewis*, 1 Bush, 66; *McLaughlin v. Green*, 50 Miss. 453; *United States v. Russell*, 13 Wall. 622; *Brit-*

ton v. Butler, 9 Blatchf. 456. If the power is exercised for the mere purpose of oppression or private gain, the party by whom or by whose order it is exercised would undoubtedly be answerable: *Luther v. Borden*, 7 How. 1, 46; *Sellards v. Zomes*, 5 Bush, 92. An unlawful taking or destruction of private property cannot be justified by an unlawful order or command of a superior officer: *Hogue v. Penn*, 3 Id. 663; *Dills v. Hatcher*, 6 Id. 607; *Terrill v. Rankin*, 2 Id. 453, 456, citing the principal case; and see *Coolidge v. Guthrie*, 1 Flip. 101; *Raymond v. Thomas*, 91 U. S. 712, 716; *Beckwith v. Bean*, 98 Id. 266. And whatever may be the rule in time of war, it is well settled that subordinate military officers can no more protect themselves than civilians for wrongs committed in time of peace, under orders emanating from a source which is itself without authority: *Bates v. Clark*, 95 U. S. 204.

ADAMS EXPRESS COMPANY v. NOCK.

[2 DUVAL, 502.]

COMMON CARRIERS ARE BOUND TO CARRY ARTICLES WITHIN SCOPE OF THEIR BUSINESS, without any other contract than such as the law would imply. LIABILITY OF COMMON CARRIERS IS PECULIARLY STRINGENT, and they will not be permitted to limit that liability by special contracts, unless they are fairly made, and are fully understood by the other party, and are clearly proved.

THE facts are stated in the opinion.

G. A. and I. Caldwell, for the appellant.

George T. Barrett, for the appellee.

By Court, ROBERTSON, J. The appellee sued the appellant as an incorporated company engaged as a common carrier in transporting, between Louisville, Kentucky, and the city of New York, commodities for compensation. The petition charged that the appellee's agent delivered to the agent of the appellant, for transportation from Louisville to New York, gun, opium, and mastic of the aggregate value of \$330.50, which the said bailee promised to deliver in good order to appellee's nominated agent in the latter city for a reasonable compensation, to be paid on delivery, and alleged a breach in a total non-delivery.

The answer—simply alleging that the contract was in writing, and essentially different from the oral agreement sued on—insisted that the action was misconceived, and could be maintained only on the written covenant, but did not exhibit or otherwise describe the written memorial.

On this state of pleading, the parties submitted to the court an agreed case, stating that, on the delivery of the articles to the appellant's agent at Louisville, the appellee's agent filled

a blank in a printed receipt prepared by the company, stipulating, among other things, against any liability beyond the amount of fifty dollars,—the manuscript filling merely describing the articles to be transported and their value, and naming the consignor and consignee and the place of ultimate delivery,—and stating, also, that the appellant admitted that the appellee could prove that his agent did not read the printed receipt, nor understand its conditions, nor sign a printed indorsement acknowledging the acceptance of the conditions, and which were not suggested to him; and that the appellee “did not see said receipt or paper until after the goods were lost”; and also, that the value of the articles was truly stated in the petition, but reserving to the appellee an exception to the admissibility of the printed paper, and to the appellant an exception to the competency of oral testimony as to the ignorance of the appellee’s agent.

On the facts as thus agreed and submitted, the circuit court gave judgment against the appellant for the sum specified in the petition and agreed to be the value of the goods.

The printed memorial of the contract was not a receipt only, but also a covenant; and therefore, if mutually binding, it would not be subject to contradiction or essential modification by oral testimony without proof of fraud or mistake in the execution of it. But the oral testimony recited in the agreed case, and admitted if competent, showed that it was neither read by the appellee’s agent, nor its peculiar conditions understood by him or even suggested to him; and therefore, and especially as he never signed the indorsement accepting the peculiar conditions, they were never obligatory on his constituent. That testimony was therefore competent, and the action is maintainable on the implied contract. Public policy imposes on common carriers a constructive liability peculiarly stringent; and as that policy might be often frustrated by permitting special contracts to qualify or relax the responsibility imposed and implied by law, there has been vexatious doubt whether any such modifying and exceptional agreement should be adjudged obligatory. Analogy, principle, and authority now, however, preponderate decidedly in favor of the legality of such contracts when fairly made, without duress, imposture, or delusion, and finally understood and clearly proved. But no such special contract will ever be implied from the mere publication of notice that the carrier will exact conditions essentially various from those prescribed by law. Nor, in a case

of importunate necessity for immediate transportation, and a refusal so to carry without a special contract, should the exaction of such a contract be sanctioned; such unreasonable extortion might be deemed duress.

As public carriers are bound to carry articles within their scope of business, without any other contract than such as the law would imply, if owners will freely and understandingly make special contracts less favorable to themselves, they can have no cause to complain that the law will enforce them. But before the law should do so, the proofs must be clear that such contract was freely made and fully understood.

The extraneous facts in this case were admissible to show, and do sufficiently show, that there was no special contract bindingly made and mutually understood. And the intrinsic fact that the appellee's agent did not sign the accepting indorsement would alone be sufficient, in all such cases, to negative any presumption that the special agreement now claimed by the appellant was ever so made as to impose on the appellee a resulting obligation enforceable by law.

The agreed facts as to the conduct and understanding of the appellee's agent were therefore competent evidence, and the printed document was inadmissible. And consequently, the value as adjudged having been admitted, the judgment as rendered was right, Judge Williams concurring in this conclusion, but uncommitted as to so much of the opinion as decides that a special contract may be binding.

Wherefore the judgment of the circuit court is unanimously affirmed.

LIMITATION OF CARRIER'S LIABILITY BY SPECIAL CONTRACT: See *Judson v. Western R. R. Corp.*, 83 Am. Dec. 646, and note 651; *Goldney v. Penn. R. R. Co.*, 72 Id. 703; *Cooper v. Berry*, 68 Id. 468, and cases collected in note 480; *Bissell v. New York Cent. R. R. Co.*, 82 Id. 369; *Perkins v. New York Cent. R. R. Co.*, 82 Id. 281, and note.

THE PRINCIPAL CASE IS CITED to the point that a special contract limiting common-law responsibility as a common carrier must be regarded as obligatory, in the absence of any allegations calling in question its fairness or binding force, in *Adams Express Co. v. Loeb*, 7 Bush, 501; and to same effect in *Adams Express Co. v. Guthrie*, 9 Id. 80; *Louisville etc. R. R. Co. v. Hedger*, 9 Id. 650. It is cited to the point that there should be an express assent to limitations of a carrier's liability, in *Gaines v. Union Transp. Co.*, 28 Ohio St. 441; *Railroad Co. v. Barrett*, 36 Id. 453; and is cited as an instance of a printed notice limiting the liability of the carrier, as distinguished from a bill of lading, in *Muller v. Railroad Co.*, 2 Cin. Sup. Ct. 286.

CASES
IN THE
SUPREME COURT
OF
LOUISIANA.

BURBANK v. PAYNE AND HARRISON.

[17 LOUISIANA ANNUAL, 15.]

WHEN PARTY DIES, LEAVING PROPERTY in two or more states or countries, his property in each is considered a separate succession for the purposes of administration, the payment of debts, and the decision of the claims of parties asserting title thereto.

POWERS OF ADMINISTRATORS APPOINTED IN DIFFERENT STATES extend only to the limits of the sovereign creating them, and neither allows the other to intermeddle with any assets within their respective jurisdictions.

IN LOUISIANA FIDUCIARY AGENTS CANNOT TRANSFER negotiable assets without an order of court, and such rule will prevail in the absence of any *lex loci contractus*.

THE opinion states the facts.

Whitaker, Fellows, and Mills, for the plaintiff.

Benjamin, Bradford, and Finney, for the defendants.

By Court, **ILSLEY, J.** The plaintiff in this case, acting as the curator of the vacant succession of Robert Woodsides, who died in the parish of Assumption, in this state, where his succession was duly opened, instituted suit in the second district court of New Orleans against Payne and Harrison, claiming from them certain funds in their hands belonging to the succession of Woodsides.

The defendants, by their answer, admitted that they had in their hands, standing to the credit of the deceased Robert Woodsides, the sum of \$521.17, and that they also hold a further sum of \$5,000, which, they say, was deposited with them some time about the 13th of March, 1860, by one Seth Kline, and

for which they issued a certificate, payable to the said Robert Woodsides, or to his order. They further represent that they believe that the said certificate is held by one J. L. Arbuthnot, who resides in Mississippi, at Woodville, who has specially notified them not to pay the said deposit nor balance of account to any one but him, in his capacity of administrator of the said Robert Woodsides, duly appointed by the proper court, in the state of Mississippi, where the deceased was domiciliated. They express their willingness to pay the several sums claimed of them, upon return of the certificate of deposit issued by them, and they pray for the appointment of a curator *ad hoc* to represent the said J. L. Arbuthnot in the suit pending.

The curator *ad hoc* answered, claiming the whole amount in controversy, as administrator of the estate of Robert Woodsides, under appointment of the probate court of Wilkinson County, Mississippi, in which capacity the certificate of deposit was received by him, and which certificate is in the following words:—

“Received of Seth Kline five thousand dollars, subject to the order of Robert Woodsides, to be at his credit on account.

[Signed]

“PAYNE AND HARRISON,

“J. L. ARBUTHNOT, Administrator.

“New Orleans, March 30, 1860.”

On the trial of the case in the court below, both the plaintiff and J. L. Arbuthnot produced their respective letters of administration, and the defendants, Payne and Harrison, being mere stake-holders, the contest is exclusively between the Louisiana curator and the Mississippi administrator. It is conceded, for the purpose of arriving at the real issue in this case, that Robert Woodsides, at the time of his demise in Louisiana, had his domicile in Wilkinson County, in Mississippi, and that his estate there, and his succession here, were properly and legally opened in both states.

That the Louisiana succession was properly opened does not admit of a doubt. It was a case specially provided for in the act of the legislature passed on the 16th of March, 1842, section 1.

And as regards the independent action of succession so opened, the opinion of the court in *Atkinson v. Rogers* is directly in point. It is there held: “The plea to the jurisdiction of the courts of this state, on the ground that the succession of T. W. Griffen had been opened in Amite County, in the

state of Mississippi, is not good in law. When a person dies, leaving property in two or more states or countries, his property in such state is considered as a separate succession for the purposes of administration, the payment of debts, and the decision of the claims of parties asserting title thereto."

It is the deliberate opinion of this court that the powers of administrators appointed in different states extend only to the limits of the sovereigns creating them, and that neither allows the other to intermeddle with any assets within their respective jurisdictions. And had any exception been taken to the right of the Mississippi administrator to stand in judgment in the case, we should, without hesitation, have maintained it; but as it is, we shall proceed to the examination of the issue presented.

The broad question presented now for solution is, whether the fund held by Payne and Harrison is assets in the Louisiana succession or in the Mississippi estate. It is urged by the curator that the money, being on deposit in the state of Louisiana, at Woodsides's demise, it is, to all intents and purposes, an asset of the succession under his administration; whilst, on the other hand, the administrator contends that the certificate of deposit, as he terms it, being in a negotiable form and in his possession, belongs to the Mississippi estate. Were this instrument in the hands of a *bona fide* indorsee from the administrator, claiming the amount of this fund, the question then might arise, whether it was transferable by indorsement, and whether the indorsement could be legally made by the administrator,—whether a payment of it made to an assignee would be a valid one. But as it is the administrator himself who is prosecuting the claim, is it not competent for the court to ascertain the nature of the title he sets up, and how and when he acquired it? Woodsides died on the 14th of March, 1860, one day after the money was deposited with Payne and Harrison by Kline; so that, at his death, that sum, with the balance previously to his credit on the books of that house, formed a part of his succession in Louisiana. It is not shown when the evidence of the deposit by Kline was taken out of the state, and it is therefore reasonable to presume it was in this state when the succession was opened here. It was in the hands of Kline a receipt to him, showing that he had paid that sum for Woodsides, and that it was subject to Woodsides's order. He might have retained this receipt for his own protection, without compromising himself with Woodsides, who

would not, for that cause, have been precluded from claiming any amount due to him on general account by Payne and Harrison, and his paid drafts on or receipts to them would have discharged them from liability. There was no condition on the face of the receipt which made the payment of the fund dependent on its production, which is usual in certificates of deposit made to order. If Kline was willing to give up the receipt, he should have done so to some person who was authorized to receive it; and certainly, the only proper person to receive it was the curator here; and the mere adventitious circumstance of its having found its way into the hands of the administrator does not, we conceive, vest in the estate in Mississippi the fund in Louisiana, payment of which might have been exacted, with or without the production of the receipt.

It is strenuously contended that it was competent for the administrator, under the law of Mississippi, to negotiate this instrument, and that it was therefore practically and legally an asset of the Mississippi estate.

We see nothing in the law of Mississippi, which is spread on the record, to show that fiduciary agents can assign moneyed instruments.

Reference is made on this point to the rulings of the courts of New Hampshire and Massachusetts; but in the absence of any *lex loci contractus*, we shall give effect in preference to the ruling of our own courts on that subject: See *Nicholson v. Chapman*, 1 La. Ann. 22. It is here held that fiduciary agents cannot transfer negotiable assets without an order of court; and there is no certainty that any such an order would ever be granted. If the amount of the receipt could be paid to the administrator at all, it would not be solely on account of its being a negotiable instrument, but because he could give a valid discharge for payment of it made to him, which we do not think he could.

It is therefore ordered, adjudged, and decreed that the judgment of the court below be affirmed, costs of appeal to be paid by appellant.

SUCCESSION TO PROPERTY IS GOVERNED BY LAW of the place where it is situated: *Packwood's Succession*, 43 Am. Dec. 230, and note 239; and see *Goodall v. Marshall*, 35 Id. 472, and note 483. Contrary to the rule expressed in the principal case, it is generally held that the law of the domicile governs the succession to or distribution of intestate's personalty, wherever it may be situated: *Townes v. Durbin*, 77 Id. 176, and note 181; *Peck v. Cary*, 84 Id. 220. The principal case is cited in *Succession of Taylor*, 23 La. Ann.

23, to the point that where a person dies leaving property in two or more states, such property, situated in each state, is considered a separate succession for the purposes of administration, the payment of debts, and decision of claims of parties asserting title thereto.

GRANT OF ADMINISTRATION CANNOT EXTEND beyond territory of the state in which it is granted: *Fletcher's Adm'r v. Sanders*, 32 Am. Dec. 96; *Salmond v. Price*, 42 Id. 204; *Packwood's Succession*, 41 Id. 341; S. C., 43 Id. 230; note to *Molynaux v. Seymour, Fanning, & Co.*, 76 Id. 668. The principal case is cited to the above point in *Mason, Adm'r, v. Ex'rs of Nutt*, 19 La. Ann. 42, and *Succession of Taylor*, 23 Id. 23.

DAVIS v. MILLAUDON.

[17 LOUISIANA ANNUAL, 97.]

REASONING AND OPINION OF COURT, upon a subject on the evidence before it, does not have the force and effect of the thing adjudged, unless the subject-matter be definitely disposed of by the decree of the court.

TENDER IN OPEN COURT OF THING DEMANDED, or its equivalent, is an admission that the thing itself is due, and is inconsistent with an averment that the thing is not due.

PLEA OF PAYMENT OR PLEA OF TENDER is inconsistent with a general denial.

TENDER OF THING CLAIMED IN SUIT, when made in the course of judicial proceedings and in an unqualified and unrestricted manner, carries with it the presumption which the law attaches to a judicial confession; but when such tender is made, not of the thing claimed, but of something else, with a special reservation of all legal rights, and with the special defense that the thing claimed is not due, and when such tender is not accepted as made, it does not have that conclusive effect.

ACTION FOR DIMINUTION OF PRICE FOR DEFICIENCY will not lie where land fronting on a bayou is sold by described metes and bounds, except the rear boundary, which is not defined, as containing a certain number of arpents. In such case the sale is one *per accretionem*, the depth of the land is presumed to be forty arpents, and the vendee takes all the land within the boundaries mentioned.

THE opinion contains the facts.

Lacey, for the plaintiff and appellant.

Ducros and Dufour, for the defendant.

By Court, LSALEY, J. This is an injunction suit, sued by Charles H. Davis, out of the second judicial district court of the parish of St. Bernard, to stay proceedings *via executiva*, which B. L. Millaudon was carrying on in the same court, for the collection of a mortgage note, given by Davis in part payment of the price of the Coiron estate, which is described in the act of sale from B. L. Millaudon to C. L. Davis, as follows: "A certain sugar plantation known by the name of Coiron's

estate, at about three miles from the river Mississippi, said parcel or tract of land being and lying on both sides of the said Bayou aux Bœufs, and measuring 1,520 arpents, and being bounded on both sides of the said bayou, on the upper line by land belonging to the estate of Joseph Ramirez, and on the lower line by land belonging to the heirs of Joseph Sanchez"; besides other property on and thereunto attached, the price of the whole property in block being a fixed one.

This is the second time that this case is presented to the supreme court for its decision (see 14 La. Ann. 868); and as great reliance is placed by Davis on the enunciation by the late supreme court, of certain principles, as final on the particular points passed on, and as having on those points the force and effect of *res judicata*, it becomes necessary to determine now whether this position be a tenable one.

On examining the decretal part of the judgment on the first appeal, we find that it merely avoids and reverses the judgment of the lower court, and remands the case for further proceedings, according to law.

In *Pepper v. Dunlap*, 5 La. Ann. 200, it was held "that the reasoning and the opinion of a court, upon a subject on the evidence before it, does not have the force and effect of the thing adjudged, unless the subject-matter be definitely disposed of by the decree of the court." And *Thompson v. Mylne*, 4 La. Ann. 206, is upon the same point and to the same effect.

Marcadé, vol. 5, p. 386, says: "Quant au point de savoir quand il y a *res judicata*, il est assurément bien simple, quoique controversé. La raison d'accord avec les textes et l'autorité de Pothier, dit assez que dès là qu'un jugement est prononcé, dès là que le point litigieux est judiciairement décidé, il y a *res judicata*. Il est clair, au surplus, que la chose jugée n'existe jamais que dans le *dispositif* du jugement, non dans ses motifs (qui ne pourraient être consultés à cet égard que pour expliquer le sens d'un dispositif obscur); et seulement dans les parties de ce dispositif qui méritent vraiment ce nom parce qu'elles tranchent la contestation, et non dans celles qui ne présenteraient que des énonciations." See also *Jackson v. Tiernan*, 15 La. 485; *Josephine v. Lee*, 6 Wheat. 109.

This court has, therefore, no hesitation in saying that all the matters presented to it in this case, whether arising out of the pleadings or the evidence adduced, remain under its entire control, unshackled by any previous action thereon, when it was examined on the first appeal. The opinions and *obiter*

dicta of our predecessors, particularly in suits which have once been submitted to them, and are again before this court for revision, are entitled to and will always receive due consideration; but as the late court retained supervisory power over all the questions involved, so will this court exercise the same power discreetly, if the ends of justice can be thereby subserved.

The first question, then, is as to the legal effect of the tender by Millaudon of other lands, to supply the deficiency in the tract sold by him to Davis; and on this point we are constrained to differ from the late court, which, however, only passed on it incidentally, in connection with a motion for a continuance, which had been overruled in the district court. The court, *arguendo*, on this point held "that the plea of tender was an admission of the deficiency in the quantity of the land sold, and was inconsistent with the plea of the general issue, and this inconsistency was not avoided by the defendant's declaration that he did not intend to waive the benefit of the latter plea."

A tender in open court of the thing demanded, or its equivalent, is certainly an admission that the thing itself is due, and is consequently inconsistent with an averment that the thing is not due. It has ever been held that the plea of payment is inconsistent with a general denial; and a plea of tender cannot be less so.

After the rendition of the judgment remanding the case, Millaudon, by an *ex parte* proceeding, withdrew his tender (which he could not do to affect any right Davis might have acquired under it), but which he does not urge: See *Boatner v. Scott*, 1 Rob. (La.) 546; *Kohn v. Marsh*, 3 La. 48.

We will therefore proceed to examine the very important question, whether the qualified tender of other lands, with a concurrent reservation of all legal rights, and the special plea that he, Millaudon, was not legally liable for the deficiency, because the sale to Davis was one *per aversionem*, precluded him from availing himself afterwards of that defense.

The tender of a thing claimed in a suit, when made in the course of judicial proceedings and in an unqualified and unrestricted manner, carries always with it the presumption which the law attaches to a judicial confession; but when such tender is made, not of the thing claimed, but of something else, with a special reservation (if the tender is not accepted as made) of all legal rights, and with the special defense that the

thing actually claimed is not due, we cannot give to a tender so made the conclusive effect claimed for it by Davis. It was virtually an offer on the part of Millaudon to buy his peace, and to put a stop to litigation. If it amounted to anything at all, as an admission, it did not go to the extent that the thing claimed was due; but simply admitted that there was a deficiency in the measurement of the land sold, but it did not preclude the party from using the defense on which he relied, if his specific offer was not accepted: See *Hough v. Vickers*, 6 La. Ann. 724; Paillet, Manuel de Droit, note 17 to art. 1356 N. C.; Merlin, verbo Confession, sec. 3; Brunoman, ad. l. 28.

The main question is now reached, whether the sale from B. L. Millaudon to Davis was, or was not, one *per aversionem*. The description in the notarial act of sale is the Coiron estate, lying on both sides of the bayou Terre aux Bœuf, between the plantations of José Ramirez and that of the heirs of Sanchez. The length of the lines fronting on the bayou is not given, but the superficial area of the property, amounting to 1,525 arpents, is expressed.

The circumstance that gives rise to the controversy now under consideration is, that in the description of the property sold, no rear boundary is defined; but that is an incident so common in the sale of lands lying on the rivers and bayous of this state, the primordial titles to which extend to the ordinary depth of forty arpents; that when in sales or other transfers of lands so situated no mention is made of the depth, that depth is always presumed.

It was so held in *Carraby v. Desmare*, 7 Martin, N. S., 664, by Judge Martin (than whom no one was better acquainted, from long practical experience, with the mode in which rural property so situated was usually described), and he therein says: "In sales of lands on the Mississippi, the tract is sometimes described by the extent of its front and the names of the owners of the tracts above and below. Nothing is said of the owner of the tract in the rear, because, generally, the tract extends to another stream, or to an uncultivated swamp. In such a sale, the ordinary depth of forty arpents is presumed as that which the vendor possessed, unless the contrary is shown. The question is one of intention as to depth, in the solution of which the court is aided by the situation of the land and the price," etc. The length of the front lines of the Coiron estate was not mentioned in the act of sale; but it can hardly be doubted that, in the sale of such a property, the

vendee could have been ignorant of it; and the area being set forth, the depth of the tract could be readily ascertained. Had the lateral lines run parallel to each other on both sides of the bayou, there could have been no deficiency at all. The difficulty is caused by the converging eastern boundary line on the north side of the bayou; but as Davis bought the land with special reference to that boundary, he must be presumed to have known in what direction it ran. There is probably no subject which has given cause more frequently for judicial investigation than that arising under articles 2471 and 850 of the civil code. Our reports teem with examples as to what do and what do not constitute sales *per aversionem*; and it is therefore not difficult to determine whether the sale of the Coiron estate belongs to that class or not. Among the numerous cases to which our attention has been directed, and which have otherwise fallen under our observation, there are some very similar, if not analogous, in their main features, to that of the Coiron estate; and they were all deemed sales *per aversionem*.

We give below the descriptions contained in the sales, extracted in each of the following cases:—

1. In *Brazeale and Sewell v. Bordelon*, 16 La. 835, as follows. "A certain tract or parcel of land on which the said Perot and wife reside, situate in the parish of Natchitoches, on both sides of the Red River, containing about 220 arpents, bounded above, on both sides of the river, by lands of the purchasers, and below, on the left (of the bayou), by lands belonging to them, and on the right (of the bayou) by land of Antoine Lenoid."

In *Préjean v. Giron*, 19 La. 423, as follows: "One tract of land lying situate in the parish of St. Martin, at Cote Gelée, containing four arpents in front, with the depth that may be about thirty-five or forty arpents, the front of the said tract beginning at the extremity of the land of Pierre Giroir, bounded on the one side by the lands of Baptiste Comeaux, and on the other side by the lands of Madame Clark Beaton."

In *Saulet v. Trépagnier*, 2 Rob. (La.) 358, as follows: "Ce qui compose bien l'habitation mentionnée aux présentes, de dixsept arpents de face au fleuve, sur une profondeur, qui sera déterminée par les titres ce qui agréé à l'acquéreur, bornée dans sa partie supérieure par l'habitation Dieudonné, et dans sa partie inférieure par celle de Mme. Veuve Delhommer."

In *Nicholes v. Adams*, 9 La. Ann. 117, as follows: "A tract of

land situate in this parish (Pointe Coupée), at a place called Village, where the said vendor now resides, containing twenty-six arpents front, and bounded above by land of Elijah Adams, and below by land of Marcelin, f. m. c., with a special reservation of four superficial arpents from the upper line, which four acres have been sold by the present vendor to O. F. Hornsby; the tract, object of this sale, containing, after the above reservation, eight hundred and fifty superficial arpents, more or less. This land fronts on the Mississippi River, as appears by titles referred to."

In no one of the case cited is there any reference whatever to a rear boundary.

Wherever, as in many of the cases referred to, the tracts sold are of triangular form, with front and lateral boundaries described, or when, as principally in the sale of town lots, all the boundaries are described, they necessarily fall within the class of sales termed *per aversionem*.

But it will be seen that in almost every case which were pronounced not sales *per aversionem*, no boundary whatever, or only one, was given.

It was so in *Lacour v. Watson*, 12 La. Ann. 215; *Fisk v. Fleming*, 15 La. 205; *Hall v. Nevil*, 3 La. Ann. 327; *Boyce v. Cage*, 7 Id. 673; and they were necessarily excluded from that class of sales.

The sale of the Coiron estate was that of a specific thing for a whole price in block; and, as it was held in *Jackson v. Barringer*, 15 Johns. 353, Davis "must be presumed to have known what land was contained in the expressed boundaries."

The identical question as to the character of this sale has been already solved by the late supreme court in the case of *Millaudon v. Davis*, 14 La. Ann. 808. In that case Davis sets up the defense of *quanti minoris* against L. Millaudon, who was prosecuting his claim, on a mortgage note, bearing on the Coiron estate, the payment of which Davis had assumed, as a part of the price of that property.

From what precedes, and in view of what we deem a fair legal construction of articles 2471 and 850, Civil Code, enacted, in all probability, with a special view to the peculiar topography of the country, we conclude that the sale of the Coiron estate was one *per aversionem*.

Our attention has been called to several bills of exception spread upon the record; but as they all relate to the claim of

Davis for a diminution of price, which we do not sustain, we do not deem it necessary to pass on them.

The judgment of the district court must be, therefore, affirmed.

It is ordered, adjudged, and decreed that the judgment of the lower court be affirmed, at the costs of the appellant.

OPINION DELIVERED BY COURT does not constitute the judgment: *Houston v. Williams*, 73 Am. Dec. 565; and the judgment does not work an estoppel as to matters inferred only by argument from it: *Long v. Baugas*, 38 Id. 694. See *Blackmore v. Greeg*, 36 Id. 171. Judgments are conclusive only as to the matters and merits actually passed upon: *Garrott v. Johnson*, 35 Id. 272; *Mosby v. Wall*, 55 Id. 71; *Lord v. Chadbourne*, 66 Id. 290; *Griffin v. Seymour*, 63 Id. 396.

TENDER ADMITS LIABILITY OR INDEBTEDNESS to the amount of the sum tendered: *Friest v. Coe*, 61 Am. Dec. 141, and note 146.

TENDER TO BE VALID MUST BE UNCONDITIONAL: *Brown v. Gilmore*, 22 Am. Dec. 223; *Brooklyn Bank v. De Grasse*, 35 Id. 569; *Holton v. Brown*, 46 Id. 148; note to *Moynahan v. Moore*, 77 Id. 470.

EVIDENCE OF PAYMENT IS INADMISSIBLE under a general denial: *McKyring v. Bull*, 69 Am. Dec. 696, and note 705; *Russell v. Fabyan*, 61 Id. 629, note 631.

ACTION FOR ABATEMENT IN PRICE for deficiency in quantity of land sold, when will lie: *Harrill v. Hill*, 68 Am. Dec. 202, and note; *Bellmap v. Sealey*, 67 Id. 120, and note; *Smith v. Fly*, 76 Id. 109, and note 114.

CITY OF NEW ORLEANS v. HALPIN.

[17 LOUISIANA ANNUAL, 186.]

IT IS PRESUMED, IN ABSENCE OF PROOF to the contrary, that city authorities have complied with the requirements of law in making a contract for the paving of city streets.

IN ABSENCE OF PROOF OF FRAUD, acceptance by city of authorized contract work, upon the certificate of a public officer that it was rightly done, is *prima facie* evidence in favor of the city as to the completion and manner in which the work was performed.

THE opinion contains the facts.

McPheeters, for the plaintiff.

Haynes, for the defendant and appellant.

Cuvellier and Fuselier, for the warrantor.

By Court, HOWELL, J. The defendant has appealed from a judgment condemning him to pay the cost of paving the street in front of his property.

The answer, besides the general issue, denies that the paving is made in conformity with the adjudication and ordinance, and denies the constitutionality of the law and the proceedings under it, by which defendant is made liable for the work.

On motion for a new trial it is urged: 1. That the law under which the paving has been done is unconstitutional; 2. That there was no evidence offered by plaintiff that all proceedings under the act had been complied with.

The first point we do not consider an open question, the constitutionality of this legislation having been long recognized in our jurisprudence: See 10 La. Ann. 59, and authorities there cited.

The second point might present some difficulty under the full and specific allegations of the petition and the general denial, had not the answer virtually admitted the passage of the ordinance and the adjudication to plaintiff and joined issue specially on the allegations as to the manner in which the work is done and the constitutionality of the laws and ordinances, while it is silent as to the observance of these formalities. It has been held that, in the absence of proof to the contrary, it will be presumed that the city authorities have complied with the law in this respect: 15 La. Ann. 376.

Everything up to signing the contract has to be done by or under the direction of public officers, in whose favor such presumption exists; and as the law requires a public officer to accept the work, and certify to its being rightly done, it is considered that, in the absence of proof of fraud, the acceptance by such officer of the work, which the city is authorized to contract for, is *prima facie* evidence as to its completion and the manner in which it is done: 14 La. Ann. 297.

In this case, the contract and specifications, the certificate of the city surveyor and his testimony, are in evidence, and until some rebutting proof is adduced, the defendant must, under the pleadings and the foregoing principles, be bound.

This is not a case in which damages should be allowed for a frivolous appeal.

Judgment affirmed, with costs.

STATE v. POSEY.

[17 LOUISIANA ANNUAL, 252.]

WHERE TERMS OF COURT ARE FIXED BY LAW for the trial of suits, a judge cannot adopt or enforce a rule of court allowing only certain cases to be tried at a particular term.

JUDGE CANNOT REFUSE RIGHT OF JUDGMENT by default accorded by law to plaintiff.

CONTINUANCE OF CASE IS NOT WITHIN DISCRETION OF COURT, except upon the showing by the parties to the action required by law.

JUDICIARY OF LOUISIANA IS NOT BY CONSTITUTION invested with legislative powers. It has no authority, by its rules, to deprive the citizen of his legal rights.

JUDICIARY MUST CONFORM TO LAW AS IT STANDS, and if the citizen desires relief from a statute which works an injury, or prevents a proper administration of justice, he must apply to the law-making power, and not to the courts.

THE facts are stated in the opinion.

By Court, HYMAN, C. J. The relatrix, Mary E. Tooreau, avers that in September, 1865, she, as tutrix of her minor children, instituted suit in the fifth judicial district court, for the parish of East Feliciana, against David S. Rhea, for \$2,851.95, with interest.

That on the second day of the term of the court, in October, 1865, the case being then ripe for default, she asked for a judgment by default against defendant, Rhea.

That the judge refused to grant the same, and continued the case, although defendant had failed to appear or answer, or make a legal showing for a continuance; and that the court was thus closed against her.

She prays that the judge be ordered to show cause why he did not proceed to hear and determine the case according to law; and that a *mandamus* be issued, ordering the judge to try the same without delay.

The judge's response is, that he had adopted a rule for the term (and that under similar circumstances he would renew it at another term), "that no cases should be tried except consent and criminal cases and matters of succession"; that he was induced thereto by reason of the distress of the people, and for the proper administration of justice; because of a petition of a large majority of the people of the parish, a resolution of the police jury, a memorial of the grand jury, and an application of the members of the bar.

The papers filed by the judge show the deplorable condition

of the country, the result of the war; but neither the papers nor the answer of the judge show a legal justification for his refusal to try cases.

The legislative power has established terms of courts for the trial of suits.

It has stated that a plaintiff may, on motion, take judgment by default against a defendant, if he appear not, within a prescribed delay: Code of Practice, 310. The defendant did not appear within the delay, neither did he ask for further time to answer; yet the judge refused the right of judgment by default, accorded by law to plaintiff.

It has also stated that it is not in the discretion of the court to grant a continuance of a case, except a party applies for it, and alleges sufficient cause to justify the same: See article of the Code of Practice, 468. This article of the code does not give to the judge authority to continue a case because a party applies for the same. The party applying must show some justification in his application; that is, some probability that injustice might be done him in the result of a trial, if forced upon him, which he might avoid by having time to prepare.

On such a showing only, of the parties to a suit, does the article give to the judge the right of deciding in his discretion whether or not a continuance should be granted.

In this case the judge has, without even a request from either party, arbitrarily forced a continuance. He has yielded to solicitations of persons, not parties, and deprived relatrix of the legal right of trial of her cause.

The judiciary is not by the constitution invested with legislative powers. It has no authority to deprive the citizen, by its rules, of his legal rights.

The judge must conform to the law, though he should think that thereby certain citizens would be injured, or that its provisions do not exactly come up to a proper administration of justice. If the citizens desire relief by the alteration of the law, for the administration of justice, they must apply to the law-making power, and not to the judiciary.

The Hon. R. T. Posey, district judge of the fifth judicial district for the parish of East Feliciana, having refused, in contravention of the legal rights of relatrix, to grant a judgment by default in the case of *Tooreau v. Rhea*, and to try the same, it is ordered in the name of the state of Louisiana that said judge set aside the continuance, and proceed in the case according to law.

RULE OF COURT IS SUBORDINATE TO LAW, and in case of conflict the law will prevail: *Suckley's Adm'r v. Rochford*, 65 Am. Dec. 240.

POWER OF COURT TO GRANT CONTINUANCE OF CASE: *Stevenson v. Sherwood*, 74 Am. Dec. 140, and extended note 141 et seq.; *Shattuck v. Myers*, 74 Id. 236; *McDaniel v. State*, 47 Id. 93, and note 101.

EACH DEPARTMENT OF GOVERNMENT, within its proper constitutional sphere, acts independently of both of the others; neither can control nor dictate to the other: *People v. Bissell*, 68 Am. Dec. 591, and note 596.

REMEDY FOR UNJUST OR UNWISE LEGISLATION is not to be administered by the courts. It remains in the hands of the people: *People v. Mayor etc. of Brooklyn*, 55 Am. Dec. 266. The courts have no right to determine the wisdom, policy, or expediency of statutes: *Winter v. Jones*, 54 Id. 379; *Moore v. Veasey*, 52 Id. 655; *Mahoney v. Hooe*, 48 Id. 706.

SCHMIDT v. BARKER.

[17 LOUISIANA ANNUAL, 261.]

DEPOSIT IS NOT REAL DEPOSIT, but a loan for the use of the banker, when the deposit is an irregular one, and in the absence of any special agreement between the banker and depositor; as, when an account is kept; where money is deposited in bank to be drawn out, not in the identical fund deposited; where money deposited is mingled with the cash assets of the bank, and used indifferently therewith.

IRREGULAR DEPOSIT OF MONEY IN BANK, in the absence of any special agreement between the banker and depositor, is merely a loan for the use of the banker. Such deposit transfers the property to the loanee, and the relation between the bank and its customers is simply one of debtor and creditor.

COURT WILL NOT LEND ITS AID TO SETTLE DISPUTES relative to invalid contracts. It will notice their illegality *ex officio*, and allow it without any plea at any stage of the proceedings.

PARTIES CANNOT BE HEARD, WHO ASK RELIEF from violation of law. They are left where their conduct has placed them, and *in para causa melior est conditio possidentis*.

CONTRACT IS VOID WHICH DEPENDS UPON CONDITION OF THING impossible, *contra bonos mores*, or prohibited by law.

PARTY, WHO BINDS HIMSELF UNWILLINGLY and under restraint, is not deemed, in the eye of the law, a participant in an illicit covenant.

PLAINTIFF MUST NOT APPEAR, FROM HIS OWN SHOWING, to have voluntarily infringed the law of the land; if he does, he cannot avail himself of the aid of a court to enforce a contract made in opposition to law.

THE opinion states the facts.

Durant and Horner, for the plaintiff.

Barker, pro se, for the defendant and appellant.

By Court, LESLEY, J. The plaintiff claims from the defendant, as the owner of the Bank of Commerce, in New Orleans,

the sum of four hundred dollars, being the balance which he avers to be due to him, on moneys deposited by him in said bank, between the seventeenth day of January and the first day of April, 1862. He complains that this balance is due and payable to him in legal-tender notes of the United States, but that the said defendant has illegally and wrongfully, without his consent, caused the plaintiff's bank-book to be balanced, as a balance of account in Confederate notes, which the plaintiff himself terms "the treasonable issue of rebels in arms against the United States."

All these allegations are traversed by the defendant, who, however, admits that the said balance is correct as to amount, but sets up, in his defense, a special contract, by which he avers that deposits were received in his bank, at the period stated, only on the condition that the amount was to be drawn for in Confederate currency. And he further specially avers that the balance of account was struck in the manner alleged by the plaintiff, with his full knowledge, and at his special request.

The only question at issue, then, between the parties is the mode in which the admitted balance is to be drawn out of the bank, in legal-tender notes or in Confederate notes.

In the absence of any special agreement or understanding between a banker and a depositor, when the deposit is an irregular one; when an account is kept; where moneys are deposited in bank, to be drawn out, not in the identical funds deposited; where moneys deposited are mingled with the cash assets of the bank, and used indifferently with his own,—the relations between a bank and its depositors are well and definitely fixed by our own law and jurisprudence, and by that of other countries in which business is transacted with such institutions.

Such deposits are not real deposits, but are loans for use to the banker. The money so deposited transfers the property to the loanee; and the relation between a bank and its customers, in regard to irregular deposits so made, is simply one of debtor and creditor: See L. C., arts. 2904, 2883, 2934, 2884; see the case of *Matthews, Finley, & Co. v. Creditors*, 10 La. Ann. 343; and that of *Sims v. Bean*, 10 Id. 346; *Grant on Banking*, 1; *Marine Bank v. Fulton Bank*, 2 Wall. 252.

But the defendant relies on his contract with the plaintiff; and if the agreement is a legal one, he might well invoke article 1940, Civil Code; which says that "legal agreements

having the effect of law upon the parties, none but the parties can abrogate or modify them, and it is incumbent on courts to give legal effect to all such contracts, according to the true intent of all the parties." See section 2 of the same article.

What was the agreement between these parties? It is that produced by the plaintiff himself; and it precedes in the bank-book the statement of the account. It is as follows:—

"Bank of Commerce, New Orleans, January 17, 1862. Deposits in this bank are received only on condition that the amount is to be drawn in Confederate currency"; and the currency is what the plaintiff himself calls the treasonable issue of rebels in arms against the United States.

This court has often held that it will not lend its aid to settle disputes relative to contracts reprobated by law. It will notice their illegality *ex officio*, and allow it without any plea at any stage of the proceedings. Parties cannot be heard who ask relief from a violation of law. The law leaves them where their conduct has placed them, and *in pari causa melior est conditio possidentis*: *Davis v. Holbrook*, 1 La. Ann. 178; *State v. Lazardie*, 12 Id. 166; *Gravier's Curator v. Carraby's Ex'r*, 17 La. 182.

Article 2026, Louisiana Code, prescribes that "every condition of a thing impossible, or *contra bonos mores* (repugnant to moral conduct), or prohibited by law, is null and void, and renders void the agreement which depends on it"; and Pothier (art. 1, c. 3, pt. 8) defines the conditional obligation as that "qui est suspendue par la condition sous laquelle elle a été contractée, qui n'est pas accomplie."

And in what light can this court, constituted as it is, and recognizing, as supreme and paramount to all other laws, the constitution and statutes of the United States, view a condition on which a deposit is received, and which condition, voluntarily acceded to by the depositor, provides for and contemplates the aiding of the circulation of the treasonable issue of rebels in arms against the United States; of an issue put in circulation for the express purpose of facilitating and carrying on the Rebellion; and which issue, on the very face of it, anticipates and purposes a disruption and dismemberment of the general government; as the notes so issued were only to be payable "six months after the ratification of peace between the Confederate States and the United States."

Such a condition in a contract is, in the words of the law, "a nullity, and renders void the agreement which depends on it."

The plaintiff was a party to this illicit contract, and his right to stand in judgment depends upon the nature of his connection with the obnoxious condition, and upon the contingency as to whether its illegality lies properly at his door.

Many of the French commentators draw a clear distinction between cases wherein both parties to the contract are compromised illicitly, and where one alone is guilty of infringing the law.

Gilbert, in his *Code annoté*, vol. 1, p. 503, in his notes to article 1133, *Code Napoleon*, says: "Les auteurs distinguent sur ce point entre le cas où la convention est illicite seulement du côté d'une des parties, et celui où elle est illicite des deux côtés. Dans le premier cas, celui qui n'a rien promis d'illicite est fondé à répéter ce qu'il a payé; dans le second, ni l'une ni l'autre des parties ne sont admises à exercer des répétitions l'une contre l'autre." *Vide* Pothier, No. 43, et suiv.; Toullier, t. 6, No. 126; Duranton, t. 2, p. 687; Delomcourt, edit. de 1819, t. 2, p. 687.

Cette distinction est prise de Paul et d'Ulpien, dans les lois 3 et 4, sec. 2, de *Condict ab turp causa*.

It is hardly necessary to add, as was said in the case of *Gravier's Curator v. Carraby's Ex'r*, 17 La. 128, that *a fortiori* the law will not lend its aid to enforce the performance of such contracts in the first instance. Duranton, with his usual aptness at illustration, demonstrates such a case as would save one of the contracting parties from the effect of an illicit agreement. It would be one in which his participation therein was caused by the force of circumstances that he could not resist without entailing on him grievous injury. That author says: "Quelquefois cependant, la cause de l'obligation de l'une des parties est illicite, sans que l'objet de l'obligation de l'autre le soit: tel est le cas où vous vous obligez à me restituer un dépôt que mon père vous a confié, sans en avoir retiré une reconnaissance, et que vous exigiez une promesse de ma part de vous payer pour cela une certaine somme.

"L'objet de cette obligation, la restitution du dépôt, est très licite, mais la cause de mon obligation de vous payer la somme est illicite, non pas sans doute par rapport à moi, mais par rapport à vous qui avez exigé une promesse pour faire ce que l'équité et le droit vous obligeaient de faire sans aucune rétribution": Duranton, art. 366, liv. 3, tit. 3.

In the example suggested by this author, he who binds himself unwillingly and under constraint is not deemed, in the

eye of the law, a participant in an illicit covenant. But was this the case with the plaintiff in this suit? Clearly not, but the very reverse of it. His acquiescence in a contract that violated the law, and tended to endanger the public safety, was entirely voluntary, of his own free will, and with his eyes open.

His participation in the illegal contract was immoral, being, as it was, in violation of law: See the case of *Davis v. Holbrook*, 1 La. Ann. 175.

What was due to plaintiff by his contract with the defendant? Four hundred dollars in Confederate money. If the shadow of a legal cause of action were disclosed in this case by the plaintiff, it is so coupled with the illicit condition as to be inseparable from it.

The whole contract is an absolute nullity; and *quod nullum est confirmari nequit, quod nullum est, nullum producit effectum. "Nemo auditur propriam turpitudinem allegans."*

The doctrine taught by Chancellor Kent, in the case of *Griswold v. Waddington*, in the court of errors, New York, meets our fullest approbation. He says: "If from the plaintiff's own stating the cause of action appears to arise from a transgression of a positive law of the country, the court will not lend their aid."

It would be difficult to state any principle of law more plainly founded on common sense and true policy than that which declares that a plaintiff must not appear, from his own showing, to have infringed the law of the land; and if he does, he cannot avail himself of the law to enforce a contract made in opposition to law. The plaintiff must recover on his own merits; and if he has none, or if he disclose a case founded upon illegal dealing, and founded on an intercourse prohibited by law, he ought not to be heard, whatever the demerits of the defendant may be.

"There is," says the chancellor, "to my mind, something monstrous in the proposition that a court of law ought to carry into effect a contract founded upon a breach of law. It is encouraging disobedience, and giving disloyalty its unhallowed fruits. There is no such mischievous doctrine to be found in the books."

The judgment of the lower court, which was in favor of the plaintiff, must be reversed.

It is therefore ordered, adjudged, and decreed that the action of the plaintiff be dismissed, and that plaintiff pay the costs in both courts.

GENERAL DEPOSIT BECOMES PROPERTY OF BANK, and may be employed in its business: *Matter of Franklin Bank*, 19 Am. Dec. 413, and extended note 418, treating of deposits, and showing them to be merely loans; see also note to *Chapman v. White*, 57 Id. 486.

GENERAL DEPOSIT IN BANK, to be used in the usual course of business, creates the relation of debtor and creditor between the bank and the depositor: *Marine Bank etc. v. Chandler*, 81 Am. Dec. 249, and note 253.

COURT WILL NOT PASS UPON VALIDITY of an illegal contract: *Alford v. Burke*, 68 Am. Dec. 449, and note 452; *Black v. Oliver*, 35 Id. 38.

CONTRACT PROHIBITED BY LAW IS VOID: *Persons v. Jones*, 58 Am. Dec. 476; *Rice v. Maxwell*, 53 Id. 85; *Milton v. Haden*, 70 Id. 523; *Hervey v. Mosely*, 66 Id. 515, and notes to these cases. Such contract will not be protected: *Mohney v. Cook*, 67 Id. 419.

PARTY IS NOT IN PARI DELICTO when he enters into an illegal contract under necessity, hardship, or great inequality of condition: *Chas L. I. & T. Co. v. Merchants' I. & T. Co.*, 53 Am. Dec. 742, and note 770; note to *Tracy v. Talmage*, 67 Id. 153. But where the parties are *in pari delicto* relief will not be granted: See cases *supra*, and notes.

PARTY TO ILLEGAL CONTRACT cannot avail himself of its illegality: *Hunt v. Turner*, 60 Am. Dec. 167; *Webb v. Fulchre*, 40 Id. 419, and note; *Spaulding v. Preston*, 50 Id. 68; *Alford v. Burke*, 68 Id. 449.

CONTRACT IS VOID WHICH DEPENDS UPON CONDITION impossible, *contra bonos mores*, or prohibited by law; hence notes and obligations the consideration of which is Confederate money are void: *Stevenson v. Payne*, 109 Mass. 381, citing the principal case.

CASES
IN THE
SUPREME JUDICIAL COURT
OF
MAINE.

Paine v. Dwinel.

[58 MAINE, 52.]

ACCEPTANCE OF NEGOTIABLE PAPER IS PRIMA FACIE EVIDENCE OF PAYMENT of the account for which it is given.

PRESUMPTION OF PAYMENT IS REBUTTED when negotiable paper is taken under a misapprehension of the rights of the parties.

THE facts appear in the opinion.

Rowe, for the plaintiff.

J. A. Peters, for the defendant.

By Court, APPLETON, C. J. On October 24, 1862, the defendants in the present suit entered into an agreement "to do business for the term of one year from the date hereof, at Port Norfolk, under the name of E. S. Howe, and to be jointly interested in the profit and loss."

One clause in said agreement was in these words: "It is distinctly understood and agreed that neither party shall sign, indorse, or give any paper binding the other, without the mutual consent of the other in writing. The said Dwinel agrees to furnish lumber from time to time for the benefit of the company, and said Howe is to guarantee all sales. Said Howe is to collect and sell for cash or prompt pay, and to purchase from no source without his consent, save from Theodore Paine, of Bangor, such shingles as he may need for retail trade."

The defendant Howe, under the agreement between him and his partner, purchased the shingles sued for in one of the

counts in the plaintiff's writ, and gave the acceptances of E. S. Howe for the same. This action is for the shingles and the acceptances given by him therefor.

It is urged that the plaintiff cannot recover on the acceptances, because they were unauthorized by the agreement between the parties. It is, however, unnecessary to determine whether this be so or not.

By the express terms of the agreement, Howe was authorized to purchase shingles of the plaintiff on joint account. The case finds the purchase was made within the terms of this agreement. Dwinel was therefore bound thereby, and is liable for the amount.

An acceptance or note payable to order is *prima facie* evidence of payment of the account for which it is given. But this may be rebutted. Upon the sale of the shingles sued for, both of the defendants were liable to the plaintiff for their price. If the acceptances are to be deemed as payment therefor, and not binding on Dwinel, as his counsel contend, then the plaintiff will have inadvertently lost, in part, the security which he had when the shingles were sold. Of this he was ignorant when he received the acceptances in suit.

When negotiable paper is taken in ignorance of the facts, or under a misapprehension of the rights of the parties, as when the negotiable paper is not binding on all the parties previously liable, the presumption of payment is rebutted: *French v. Price*, 24 Pick. 13; *Fowler v. Ludwig*, 34 Me. 455. It may be otherwise where a creditor, with full knowledge of all the facts, takes the security of a part of his debtors. In *Melledge v. Boston Iron Co.*, 5 Cush. 158 [51 Am. Dec. 59], it was held, when a party gave his promissory negotiable note for a simple contract debt, that the legal presumption was, that such note was accepted in discharge of the pre-existing debt, but this might be disproved by showing that it was not the obligation of all the parties originally liable, and that the party receiving the same was ignorant of such fact. To the same effect is the case of *Butts v. Dean*, 2 Met. 76 [35 Am. Dec. 389]. The general doctrine is, that the taking of a note is to be regarded as payment only when the security of the creditor is not thereby impaired. In all cases, the presumption of payment is liable to be rebutted: *Page v. Hubbard*, Sprague, 335. These positions are fully affirmed by this court in *Kidder v. Knox*, 48 Me. 551.

It is unnecessary to consider the general liability of Dwinel under his contract of copartnership, or whether Howe, in his

purchases of the plaintiff, was specially limited to cash. The shingles were bought in accordance with the express terms of the agreement entered into by these defendants, and the plaintiff is entitled to recover their price.

Defendants defaulted.

WHEN GIVING OF NOTICE OPERATES AS PAYMENT: *Blunt v. Walker*, 78 Am. Dec. 709, and note 718; *Tyner v. Stoops*, 71 Id. 341, and note.

PRESUMPTION OF PAYMENT from giving note: See *Barnet v. Smith*, 64 Am. Dec. 290, and note 296.

ORDINARILY PROMISSORY NOTE MERELY SUSPENDS PAYMENT: *Blunt v. Walker*, 78 Am. Dec. 709.

THE PRINCIPAL CASE IS CITED to the points stated in the *syllabus*, in *Crosby v. Redman*, 70 Me. 58; *Mehan v. Thompson*, 71 Id. 501; *Atkinson v. Minot*, 75 Id. 193; *Castle v. Belfast Foundry Co.*, 72 Id. 173; and is cited in support of the rule that when members of a firm, having no firm name and no joint estate other than that of the firm, give a joint note signed in their individual names for money borrowed for and used in their partnership business, such signing binds the partnership as effectually as any other could, in *Ex parte Nason*, 70 Id. 366; *Ex parte First Nat. Bank*, 70 Id. 380.

INHABITANTS OF SOUTH BERWICK v. HUNTRESS.

[58 MAINE, 89.]

PARTY SIGNING AND DELIVERING INSTRUMENT TO ANOTHER, AS HIS DEED, in an imperfect state, must be held as agreeing that the blanks may be filled after he has executed it; and this principle includes the insertion of the penal sum of a collector's bond.

DEBT on a collector's bond. The opinion states the case.

Tapley and Smith, for the plaintiffs.

Howard and Cleaves, for the defendants.

By Court, KENT, J. The exceptions present a single question for our determination. The counsel for the plaintiffs requested this instruction, which the facts of the case made pertinent and applicable, "that a party executing a bond, knowing that there are blanks in it to be filled up, necessary to make it a perfect instrument, must be considered as agreeing that the blanks may be thus filled after he has executed the bond." The presiding judge, in his instructions, assented to this as correct when limited "to such matters appearing on the face of the instrument to be certain, such as the names of the sureties who had signed, but that this rule would not apply to the penal sum in the bond; that being uncertain in

its amount." He further instructed the jury, in substance, that they must be satisfied, from all the evidence, that Huntress was authorized by the defendants to insert the penal sum; and if not so proved, that the insertion would be a material alteration, and render the bond "invalid." The jury must have understood that something more than the facts assumed in the request must be established by proof.

It seems to be now well settled that where a party executes a deed or bond or other instrument, and delivers the same to another, in an imperfect state, and gives authority to that person to fill up the blanks, and thus perfect the instrument, and he does so, its validity cannot be controverted. This authority may be by parol. It may be implied from the facts proved when those facts, fairly considered, justify the inference. When the authority is established, either by evidence of express authority, or by implication, the power will extend as far as such express or implied authority is given. The law on this subject has recently been stated by the supreme court of the United States in *Drury v. Foster*, 2 Wall. 24.

There is a class of cases where it is held that it is not a material alteration to insert a word or words that the law would itself supply, as the word "hundred" before "pounds," where the condition of the bond first stated that the full sum of one hundred pounds shall be paid by installments specified, and then added the words "until the sum of one — pounds shall be paid." The court held that it was plain what the meaning of the parties was, and what the party signing intended to be bound for: *Waugh v. Bussell*, 5 Taunt. 707.

In the case of *Hunt v. Adams*, 6 Mass. 519, the same rule was applied to the case, where the word "year" had been inserted before the words "of our Lord." In this case, Chief Justice Parsons discusses somewhat the general doctrine, and says that the consent of the obligor may as well be implied from the nature of the alteration as when expressed. He cites several cases where, without any evidence of assent beyond the instrument itself, alterations had been made by filling blanks. To the same point is the case of *Brown v. Pinkham*, 18 Pick. 172.

In the case at bar the requested instruction assumes that there was no direct evidence of authority to fill the blanks beyond the fact that the party executed the bond knowing that there were blanks to be filled up. The question, then, is one as to the implied authority of the person for whose use the

bond was made to fill any or all the blanks before delivering the bond to the town.

It may be likened to a case of an accommodation note, indorsed when imperfect, and left with the maker, for whose use it was made, to be negotiated by him. In numerous cases of this kind it has been held that an indorsement on a paper without sum or date, or time of payment, will hold the indorser for any sum, payable at any time, which the person to whom the indorser intrusts it chooses to insert: *Violett v. Patton*, 5 Cranch, 142; *Russel v. Longstaffe*, Doug. 514; or where the name of the payee is left blank: *Cruchley v. Clarence*, 2 Maule & S. 90; or where indorsements on blank pieces of paper were left with a clerk, the party indorsing expecting and intending that promissory notes would be written on them: *Putnam v. Sullivan*, 4 Mass. 45 [3 Am. Dec. 206].

Where the indorsers commit a promissory note to the maker, with a blank for the date, they authorize him to fill it up with what date he pleases, even a date prior to the day of the actual making of the note, which was payable in sixty days from date: *Mitchell v. Culver*, 7 Cow. 336. So, if the sum be left in blank, it may be filled up: *Mechanics' & F. Bank v. Schwyler*, 7 Id. 337, in note.

Where it appears that the parties intended that the note should be for eight hundred dollars, and it read, pay "eight," with a blank space, the maker, without the assent of the indorser, may insert the words "hundred dollars," and the indorser will be holden: *Boyd v. Brotherson*, 10 Wend. 93.

Where a party intended to give a note for the amount of a debt, which amount he minuted in figures on the margin, but wrote the note for \$300 instead of \$334 (the sum on margin), it was held that the creditor may, without express authority, insert the words and sum omitted: *Clute v. Small*, 17 Wend. 238.

In each of these cases the decision seems to rest upon the fact that the filling up or insertions were in accordance with the intention of the parties, and to carry out and fix the liabilities actually agreed upon or assented to.

There are numerous cases analogous in principle to the one before us. They are cases where the court has, in effect, made the insertions itself, to carry out the obvious intentions of the parties. In all such cases it is fair to infer that if they had been made by a party they would have been sanctioned by the court. The court in this matter would seem to have no greater legal right than an individual.

Thus, in the case of *Coles v. Hulme*, 8 Barn. & C. 568, 15 Eng. Com. L. 299, where the penal sum was stated as seven thousand seven hundred, it was held that the word "pounds" must be inserted by the court. In *Green v. Walker*, 37 Me. 27, where a replevin bond bound the plaintiff to pay to himself costs, damages, etc., it was held that it should be read as if defendant's name was inserted in place of plaintiff's. In this case will be found citations of numerous authorities on this subject: *Coolbroth v. Purinton*, 29 Id. 469.

It may, perhaps, be doubtful whether some of these cases do not go beyond the true limit; particularly the one cited from 17 Wendell, where the party was allowed to insert an additional sum into the body of a note, which was a perfect instrument before. The amendment and interlineation would seem to make a new contract, and to vary and alter essentially the one written and signed, without the assent of the maker, on the single ground that, by evidence *aliunde*, it appeared probable or reasonably certain that the party intended to give a note for the larger sum inserted afterwards.

There seems to be a manifest distinction between the addition of new words or the erasure of words and the substitution of others, changing the liability in an instrument perfect when signed, and the insertion of words to fill up blanks, which the party signing knew must be filled up to make the bond or contract perfect in form or substance. In the one case, it is, in effect, making a new contract; in the other, it is but finishing and making perfect the contract agreed upon.

The law on this subject in Massachusetts, before the separation, is stated by Chief Justice Parsons in *Smith v. Crooker*, 5 Mass. 538. That was a case on a collector's bond, in which, after the surety had signed, a blank had been filled. The judge, after stating the general principle, that it would not be an alteration which would avoid the bond, to fill up blank spaces left, if the party executing the bond agrees that it may be afterwards filled up, says: "And the party executing the bond, knowing that there are blanks in it to be filled up by inserting particular names or things, must be considered as agreeing that the blanks may be thus filled after he has executed the bond." This decision is cited and accepted by the counsel on both sides as the rule to be applied to the case at bar.

It was adopted by the presiding judge, but he ruled that the filling of the blank space left for the insertion of the penal

sum did not come within the rule. The correctness of that ruling is the question now presented by the exceptions.

It is evident that the implied authority is limited, but it clearly may extend beyond mere matters of form, or the mere insertion of words, which the law itself would supply. It may, as it has been shown, extend to those matters which are required to make it a binding and perfect instrument.

We think that when a party signs a bond, and delivers it to another, not stipulating or expecting that the paper will be returned or afterwards exhibited to him, but be delivered to the obligee when perfected, and when he so delivers it, there are blanks in it to be filled up before it can be perfected, and he knows the fact, those blanks may be filled up without any further knowledge or assent on his part, provided that the insertions thus made do not change the relations of the parties, or alter or vary the actual agreement made, or create any new liability, or enlarge any responsibility embraced in the contract between the parties, but only make perfect in writing what was actually agreed upon. It cannot be controverted when thus completed. In the case at bar, the whole contract or agreement is manifest from the condition, which was a part of the bond when signed. How far the rule may apply to cases where the whole proof of the agreement is found in extraneous evidence, we are not now called upon to decide. It is clear that, at all events, the evidence must be of a plenary and conclusive character, and leave no doubt of the exact character and terms of the bargain or understanding between the parties.

We are aware that a distinction has been taken between parol contracts and those under seal, and that in some cases it has been held that the rule cannot be applied to bonds or deeds. A recent case in Massachusetts (*Burns v. Lynde*, 6 Allen, 305) seems to favor this view. That, however, was a case where, when the seal and signature were affixed to the paper, it was a printed form of a deed, in which none of the blanks had been filled up. As the court say: "When the paper was delivered it had no validity or meaning. The filling of the blanks created the substantial parts of the instrument itself, as much so as the signing or sealing." The defendant filled the blanks, after it was given to him by the signer, in her absence, by entering the names of the parties, the description of the land, and the agreement of release of dower on her part, and the date, and other words necessary to complete

it. The defendant offered to prove that when she signed it, she authorized him to fill it up as he did, and that after it was filled up and the husband had executed it, the defendant informed her of the facts, and she thereupon verbally assented to what had been done, and agreed that it should be taken to be her deed, duly executed. This evidence was excluded; and the court held that the prior authority did not give a right to make this entire deed, and that the subsequent assent did not amount to a new delivery.

That case differs from the one before us in several particulars, especially in the point that the paper or deed, when signed, contained nothing expressive of the intentions of the parties, or a description of the property to be conveyed. Nothing could be gathered from it.

The examination of various cases in this country and in England shows that whilst in some of them the strict rule has been recognized, yet there are none that deny the proposition that in some cases blanks may be filled in sealed instruments by a third person who is not authorized by power under seal. The only distinction taken between parol contracts and those under seal is a purely technical one, viz., that an authority to make a deed or execute a sealed instrument for another must be of as high a character as the instrument,—i. e., be under seal. It is an unquestioned doctrine of the common law that a person not authorized by power under seal cannot execute a sealed instrument for another, or change a parol contract into a specialty. Now, if it is the absence of the seal on the authority that prevents the validity of the execution, it would seem that nothing could supply it, not even consent by parol. And yet, as before stated, all the cases seem to recognize the validity of such filling up, if done in the presence of the grantor or obligor. A distinction is taken between express consent inferred from the act being done in the presence of the grantor, and consent given before or after, or implied consent. *Warring v. Williams*, 8 Pick. 322; S. C., 8 Id. 325; *Hudson v. Revett*, 5 Bing. 368, 15 Eng. Com. L. 467.

In these cases it is assumed that the act is done by the assent and authority of the grantor because he is present when it is done by another. And yet, if the authority must be under seal, where is the evidence of it? The whole evidence is parol; the fact of the presence and the assent is proved by parol. The act derives its efficacy only from authority dependent on other sources than a seal. It is consent that gives

it vitality, and that consent, it is proved by parol, was given by parol. Why may not consent be established by proof that the authority was directly given before the act was done, and when the paper was not before him? There is no clearer parol authority in one case than in the other. It is, after all, a mere question of assent. Now, consent may be implied as well as expressed, and when fairly and legally inferred, it is actual and effective consent as much so as when direct authority is shown by parol. It would seem to follow that the rule requiring authority under seal should either be strictly enforced in all cases of bonds or deeds, so that no interlineations or insertions can be legally made without such power, or the rule should be that such filling up may be made when authority or consent is clearly established by parol. And this on the ground that, if necessary, the act may be considered as having been done, in substance, by the grantor himself. When the instrument is a sealed instrument when signed by the party, the filling in of the blanks afterwards by another is not, strictly speaking, the execution of a sealed instrument. That has already been done by the party himself. The third party does not make it a specialty by his act. It was one before. The filling up merely perfects an imperfect sealed deed or bond. This is the view taken by the English court in *Hudson v. Revett*, 5 Bing., before cited. The court say (by Gussellee, J.): "The way in which I consider that this deed is good is this: that it was an imperfect execution, with an agreement at the time that it should take effect when the blanks were filled up." On this point, see *Knapp v. Maltby*, 13 Wend. 587.

In one of the most recent cases in England, that of *Eagleton v. Gutteridge*, 11 Mees. & W. 466, it was held that the filling in of a blank in a power of attorney under seal which was sent from a foreign country did not invalidate it, on the ground that consent might be inferred.

The court in Massachusetts, in the learned opinion before cited of *Burns v. Lynde*, 6 Allen, 305, admit that the American decisions are generally against the strict views taken by them. This is undoubtedly so. In Pennsylvania, in the case of *Wiley v. Moor*, 17 Serg. & R. 438 [17 Am. Dec. 696]. In numerous cases in New York: *Commercial Bank v. Kortright*, 22 Wend. 364 [34 Am. Dec. 317]; *Wooley v. Constant*, 4 Johns. 54 [4 Am. Dec. 246]; *Ex parte Decker*, 6 Cow. 60; *Ex parte Kerwin*, 8 Id. 118; *Humphreys v. Guillow*, 13 N. H. 385 [38 Am. Dec. 499]. These cases, and numerous others in differ-

ent states, recognize consent as the essential fact, and do not give any greater effect to consent, when express or implied from the presence and presumed knowledge of the signer, than when fairly implied from his acts or declarations. Nor do they distinguish between prior and subsequent assent.

The supreme court of the United States had in several cases indicated the same general views: *Speake v. United States*, 9 Cranch, 28; *White v. Vermont and M. R. R.*, 21 How. 575. And the same court, in the recent case of *Drury v. Foster*, 2 Wall. 24, has distinctly and unqualifiedly settled the question. The court say: "We agree that by signing and acknowledging the deed in blank, and delivering the same to an agent, with an express or implied authority to fill up the blank and perfect the conveyance, its validity could not well be controverted. Although it was at one time doubted whether a parol authority was adequate to authorize an alteration or addition to a sealed instrument, the better opinion at this day is, that the power is sufficient."

The rule invoked is purely technical. Practically, there is no real distinction in this matter between bonds and simple contracts. There is no more danger of fraud or injury or wrong in allowing insertions in a bond than there is in allowing them in a promissory note or bill of exchange. Both are agreements or contracts, and in neither can unauthorized alterations be made with impunity. Considering that the assumed difference rests on a mere technical rule of the common law, we do not think that the rule should be extended beyond its necessary limits, viz., that a sealed instrument cannot be executed by another, so far as its distinguishing characteristic as a sealed instrument is in question, unless by an authority under seal.

It remains to apply the principles before stated to the case before us. The ruling of the judge was in favor of the plaintiffs, so far as the insertion of the names of the sureties who had signed, and all other matters appearing on the face of the instrument to be certain. The only question is as to the insertion of the penalty. The case, as stated in the report, sets out various questions of fact which were in dispute, and recites that there was evidence tending to show that the bond was in a certain condition when signed as to blanks and seals. We, however, can only look to the rulings and the request, when the facts are not stated as agreed upon or settled. The request assumes that the party had signed and executed the

bond before parting with it. This could only be done by sealing it himself. The ruling on the point of the insertion of the penal sum assumes that, if Huntress was authorized by the defendants to insert the penal sum, he might do so; but that this authority must be distinctly proved, and required other evidence to sustain it than was required to authorize the insertion of other matters appearing on the face of the paper to be certain. The reason given is that the penal sum of the bond is uncertain.

At first view the penalty seems to be a vital and controlling part of the bond. But in truth, in a bond with a condition subject to chancery, the condition is the essential portion. The penal sum is almost a matter of form. In this case the parties intended to execute a bond to secure the town from loss by the defaults of the collector. This was the whole substance of the agreement. This was what the parties understood and assented to. This is the whole of the condition as expressed in the bond. Now, no penal sum, however large, could extend this liability. If large enough to cover the possible deficiencies, any increase of that amount would be simply nugatory, and of no avail to charge the signers. If a less sum is inserted, it may save the signers from a portion of their assumed liability, and therefore could not be objected to by them on the ground that it enlarged the responsibility assumed by them in the condition. So that *quacunque via data*, the insertion of any sum as the penalty cannot charge the obligors beyond the actual liability secured in the condition which was in the bond when signed. The insertion of a penal sum, therefore, operated simply to perfect the bond according to the original understanding, without injuriously affecting the signers. In a bond like this, it is one of those things which Parsons, C. J., says may be inserted without thereby avoiding the bond. The principle was correctly stated by the judge, but we think he erred in distinguishing between the penal sum and the other insertions. The case must go back for a new trial on the principles stated in this opinion.

Exceptions sustained. New trial granted.

DEEDS EXECUTED IN BLANK BY ONE PROPERLY AUTHORIZED, and afterwards filled up by the real party in interest, constitute a good conveyance: *Lamar v. Simpson*, 42 Am. Dec. 345.

EFFECT OF DEFECTS IN EXECUTION OF BONDS: See *Giles v. Halsted*, 61 Am. Dec. 668, and note 671.

THAT BOND EXECUTED WITH BLANK FOR INSERTION OF ITS AMOUNT is not a deed, see *Williams v. Crutcher*, 35 Am. Dec. 422; *Davenport v. Sleight*, 31 Id. 420.

THE PRINCIPAL CASE IS CITED to the point stated in the *syllabus*, in *State v. Pepper*, 31 Ind. 86: and is cited and distinguished in *Dover v. Robinson*, 64 Me. 188.

KENT v. JUDKINS.

[58 MAINE, 160.]

IF PRIVATE WAY BE UNLAWFULLY OBSTRUCTED BY OWNER OF ADJOINING LAND, a person entitled to use the way may pass over the adjoining close, so far as may be necessary to avoid the obstructions, taking care to do no unnecessary damage.

TRESPASS *quare clausum fregit*. The defendant justified under an alleged right of way, which right the plaintiff denied, and also contended that if the defendant had a right of way over his land, he was nevertheless a trespasser, because he had deviated from the track usually taken by him, and passed over other lands of the plaintiff. The judge's instruction to the jury, to which the plaintiff excepted, appears in the opinion.

G. C. Voss, for the plaintiff.

E. O. Bean, for the defendant.

By Court, WALTON, J. The question to be determined in this case is, whether, if a private way is unlawfully obstructed by the owner of the adjoining land, a person entitled to use the way may justify passing over the adjoining close, so far as may be necessary to avoid the obstructions, taking care to do no unnecessary damage.

The law is well settled that a traveler upon a highway may lawfully pass over the adjoining land when from any cause he finds the road impassable. This is justified upon the ground of necessity. "Serious inconveniences, to say the least, would follow, especially in a climate like our own, if this right were denied to those who have occasion to pass over the public ways. Not only would intercourse and business be sometimes suspended, but life itself would be endangered. In hilly and mountainous regions, as well as in exposed places near the sea-coast, severe and unforeseen storms not unfrequently overtake the traveler, and render highways suddenly impassable, so that to advance or retreat by the ordinary path

is alike impossible. In such cases, the only escape is by turning out of the usually traveled path and seeking an outlet over the fields adjoining the highway. If a necessity is not created under such circumstances, sufficient to justify or excuse a traveler, it is difficult to imagine a case that would come within the admitted rule of law. To hold a party guilty of a wrongful invasion of another's rights, for passing over land adjacent to the highway, under the pressure of such a necessity, would be pushing individual rights of property to an unreasonable extent, and giving them a protection beyond that which finds a sanction in the rules of law. Such a temporary and unavoidable use of private property must be regarded as one of those incidental burdens to which all property in a civilized community is subject": *Campbell v. Race*, 7 Cush. 408 [54 Am. Dec. 728].

Why should not a traveler on a private way, under the pressure of a like necessity, enjoy the same privilege? There are hundreds, and probably thousands, of families in this state who have no way of getting to and from their houses except by means of private ways through the lands of others, especially in our frontier and remote settlements. Are their lives of less value when traveling on one of these private ways than when traveling on a highway? Are the rights of the adjoining owner more sacred in the one case than the other?

It has been held, in one case in New York, that the owner of a private way cannot justify passing over the adjoining land in any case: *Williams v. Safford*, 7 Barb. 309. But it was long ago held in England, in a case reported by Sir William Jones, that where a person has a right of way through another's land, and the way is impassable, through the fault of the owner of the land, a person entitled to use the way may go *extra viam*. The action was trespass *quare clausum*. Defendant pleaded a right of way. Plaintiff replied that the defendant went out of the way. Defendant rejoined that the way (a foot-path) was foundurous, etc., "in default of the plaintiff, who ought to amend it." This was resolved to be a good plea and justification: *Henn's Case*, W. Jones, 296; Greenl. Cru., tit. 24, secs. 17, 18; Tudor's Leading Cases, 127.

And in a recent case in Massachusetts, the court held the law to be clear and unquestionable, that if the owner of land, which is subject to a private right of way, obstructs the way, a person entitled to use the same may lawfully enter upon

and go over the adjoining land. The case was this: The defendant had a private right of way over the plaintiff's land, which the latter plowed up and fenced. Defendant thereupon passed over the plaintiff's land in a different place. Plaintiff then obstructed that place. Defendant then entered at still another place. Plaintiff also obstructed this. Defendant then selected and used a fourth place of entrance. Plaintiff thereupon sued the defendant in an action of trespass. The court declared the defendant's right to pass over the adjoining land of the plaintiff to be clear and unquestionable: *Leonard v. Leonard*, 2 Allen, 543.

This decision is founded upon a fundamental principle of the common law, namely, that a man shall not be heard to complain of an injury which is the direct and necessary result of his own illegal act; the same principle that justifies the breach of another's close, to recapture goods unlawfully taken, or to abate a nuisance, or to restrain the owner of the close from committing a felony. *Frustra legis auxilium quaerit qui in legem committit*. Vainly does he who offends against the law seek the help of the law. The law will not allow the owner to complain of a breach of his close which his own unlawful acts have made necessary.

In this case, the presiding judge instructed the jury, in substance, that if the plaintiff unlawfully obstructed the defendant's way, the defendant had a right to enter upon and go over the adjoining land of the plaintiff, so far as would be necessary to avoid the obstructions, taking care to do no unnecessary damage. We think this instruction was correct.

Exceptions overruled. Judgment on the verdict.

ROAD EASEMENT OVER LAND FOR CERTAIN PURPOSES cannot be used for other purposes: *McTavish v. Carroll*, 61 Am. Dec. 353, and note 364.

LIABILITY OF TOWN FOR INJURY TO TRAVELER, sustained in turning from traveled part of way to avoid snow-drifts: *Savage v. Bangor*, 63 Am. Dec. 658, and note.

THE PRINCIPAL CASE IS CITED in support of the point stated in the syllabus, in *Rockland Water Co. v. Tillson*, 75 Me. 177; *Jarstadt v. Smith*, 51 Wis. 98.

OLIVER v. BERRY.

[58 MAINE, 306.]

PERSONS DEAF AND DUMB FROM BIRTH ARE, *prima facie*, non compos mentis, and the statute of limitations does not run against them unless they are shown to possess sufficient intelligence to know and comprehend their legal rights and liabilities, and thereby rebut the legal presumption of incapacity.

ASSUMPSIT on a promissory note given to the plaintiff for services in the defendant's mill. The defense was the statute of limitations. The plaintiff, who had been deaf and dumb from infancy, was able to labor, but no evidence was offered to show that he had sufficient intelligence to know and comprehend his legal rights and liabilities. There was evidence of payments on the note within six years, but the jury returned a verdict for the defendant

Gilbert, for the plaintiff.

Tallman and Larrabee, for the defendant.

By Court, WALTON, J. The statute of limitations does not run against a person deaf and dumb, unless he is shown to possess sufficient intelligence to know and comprehend his legal rights and liabilities. The improved method of educating such persons, adopted at the present day, develops in them a higher degree of intelligence than it was formerly supposed they possessed; but nevertheless, as the want of hearing and speech must necessarily prevent a full development of their intellectual powers, and place them at a great disadvantage in their dealings with others, the law throws around them for their protection the presumption of incapacity to manage their own affairs till the contrary is shown. This presumption, however, is not conclusive; it may be rebutted. But when a person is shown to have been deaf and dumb from his birth, it is *prima facie* evidence of incompetency, and unless rebutted must be regarded as establishing it. Such seems to have been the rule of the common law from a very early date: *Brower v. Fisher*, 4 Johns. Ch. 441. In this case, Chancellor Kent says that the presumption is a reasonable one, and that a special examination to repel the inference of imbecility seems always to have been required. Lord Hale refers to the laws of King Alfred as recognizing the doctrine: 1 Hale P. C. 34. The same rule prevails in the civil law: Justinian's Inst., lib. 1, tit. 23, sec. 4; see also 1 Greenl. Ev., sec. 366; and 2 Kent's Com. 452 (Little and Brown's ed. 609), and authorities there cited.

The plaintiff's right to recover in this action seems to have been fully established, unless it was barred by the statute of limitations. The statute of limitations does not apply to an insane person (R. S., c. 81, sec. 100); and the words "insane person," as there used, are declared to be applicable to a person idiotic, or *non compos mentis* (R. S., c. 1, sec. 4, rule 8), which, as we have already seen, a person deaf and dumb is *prima facie* presumed to be. The plaintiff was shown to have been deaf and dumb from his infancy, and no evidence was offered to show that he possessed sufficient intelligence to know and comprehend his legal rights and liabilities, and thereby rebut the legal presumption of incapacity. The evidence of payments within six years was very strong, and it is difficult to understand why it did not satisfy the jury of the fact. The court is of opinion that the verdict was clearly wrong.

Verdict set aside. New trial granted.

VALIDITY OF CONTRACTS WITH PERSONS *non compos mentis*: *Sims v. McLure*, 70 Am. Dec. 196, and note 200.

ACTIONS BY OR AGAINST PERSON *non compos mentis*: *Ex parte Northington*, 79 Am. Dec. 67, and note 68; *King v. Robinson*, 54 Id. 614.

BRACKETT v. PERSONS UNKNOWN.

[88 MAINE, 282.]

IN PETITION FOR PARTITION, SOLE SEIZIN IN RESPONDENT MAY BE ESTABLISHED by a possession commenced twenty years before the trial, although less than twenty years before the commencement of the suit.

OPEN, NOTORIOUS, EXCLUSIVE, AND ADVERSE POSSESSION of upland adjacent to flats, for twenty years, under a duly recorded deed, gives title to all the flats fronting such upland, and described in the deed.

REQUESTED INSTRUCTIONS ARE PROPERLY REFUSED, when they call upon the court to take from the jury the determination of facts, or when the case does not show the facts to which the requested instructions relate.

DESCRIPTION IN DEED, "THENCE NORTHEASTERLY AS FORD RIVER RUNS," includes the flats to the middle of said river.

WIDOW IS ENTITLED TO DOWER IN FLATS OWNED BY HER HUSBAND, although they are covered by tide-waters, and remain unimproved down to the time of his death.

PETITION for partition. The opinion presents the case.

F. O. J. Smith, for the petitioners.

E. and F. Fox, for the respondents.

By Court, APPLETON, J. This is a petition for partition of certain flats. The petitioners derive title from Thomas Brackett. The respondents set up a title by adverse possession.

"The respondents," who claim the premises in "fee, by record title as well as by possession," as appears from the report, "put in sundry meane conveyances, which need not be copied, but may be referred to by either party, by which (it is admitted) all of the upland adjoining the flats in question were derived by sufficient title from Thomas Brackett, made during his lifetime or subsequently to his decease, and that the respondents, and those under whom they have claimed, for more than twenty years past have been in open, notorious, exclusive, and adverse possession of the uplands, and claimed the flats in question by recorded titles of uplands and flats; that no actual, adverse, and continued occupancy of said flats, other than by occupancy of the upland, and claiming title on record of the flats adjacent and appurtenant, has been made by the respondents, or those under whom they claim, for a period of twenty years past, while no possession has been had of the flats or upland by any of the petitioners, or by any other person, except the respondents."

The counsel for the petitioners requested certain instructions, the correctness of which, as well as those given, will be considered.

1. "That a conveyance made by a party having no legal record title, or open, notorious, adverse, and exclusive possession of the premises, does not constitute disseisin of any person by either the grantor or grantee in such conveyance, nor by any one claiming under them, or either of them, beyond what such successors to such grantor have established for more than twenty years before the entry of the petitioners' petition, by open, notorious, and exclusive actual occupation."

This instruction was given, except that the limitation of the twenty years' possession was before the time of the trial instead of the entry of the petition.

The limitation was properly imposed. In a petition for partition, a sole seisin in the respondent may be established by a possession commenced twenty years before the trial, though less than twenty years before the commencement of the suit: *Saco Water Power Co. v. Goldthwait*, 35 Me. 456.

If, in some respects, the court erred in favor of the peti-

tioners, it is not for them to complain. The instruction given is sufficiently favorable.

It required the admitted fact of occupation for twenty years of upland and flats under a recorded title.

2. The second request was refused, and properly. But "the jury were instructed that such an occupation for twenty years, if under recorded deeds purporting to convey both flats and upland, would warrant the jury to find the title of both flats and upland in the occupants, provided no other person had or claimed possession of a title in the flats."

The instruction as given, it has been seen, in *Brackett v. Persons Unknown*, 53 Me. 228, is in entire conformity with the well-settled principles of law.

3. The third request was properly refused. It required the court to determine the effect of the evidence instead of submitting the facts under proper instructions to the jury.

4 and 5. The fourth and fifth requests were properly refused, because they take away from the jury the right to determine the facts in question, and because the bill of exceptions is silent as to the facts to which they relate.

6. The sixth request was granted.

7. The seventh request was refused, and the jury were "instructed that the deed of Thomas Brackett to Mary Smith, dated October 9, 1787, did, by its terms and the references contained in it, convey the flats appurtenant to the upland therein described."

This was correct. The description in the deed is as follows: "Beginning at the most southerly corner of that lot or parcel of land which has been set off to Kerranhappuck Brackett as part of her dower, thence north forty-five degrees west 112 rods to a stake; thence south thirty-three degrees east 127 rods; thence northeasterly, as Fore River runs, twenty-eight rods to the first bounds."

The grantee bounded on a river goes *ad medium flum aquæ*, unless there be decided language showing a manifest intent to stop short at the water's edge. Where premises adjoining a river are described as bounded by a monument standing on the bank, and a course is given as running from it down the river, as it winds and turns, to another monument, the grantee takes *usque flum aquæ*, unless the river be expressly excluded from the grant by the terms of the deed: *Luce v. Carley*, 24 Wend. 451. "It is never thought," says Cowen, J., "that monuments mentioned in such a deed as occupying the bank

of the river are intended by the parties to stand on the precise water-line at its high or low water mark. They are used rather to fix the terminus of the line, which is described as following the sinuosities of the river." So, "down the creek, with the several meanders thereof," was held to describe the water in the bed of the creek, and not the top of the bank: *McCulloch v. Aten*, 2 Ohio, 307. The Fore River, it is manifest, must have been regarded as one of the boundaries: *Pike v. Munroe*, 36 Me. 309 [58 Am. Dec. 751].

9. The ninth requested instruction was not given, but instead thereof the same was given as in *Brackett v. Persons Unknown*, 53 Me. 228, the correctness of which was fully affirmed in that case.

10. The tenth was, that flats covered by tide-waters, unimproved down to the time of the husband's decease by any actual and exclusive occupation, are not the subject of dower within the meaning of the statutes of Massachusetts, or the law of that state; at the time of the decease of Anthony Brackett, etc.

When a man is seised during coverture of an inheritance in lands and tenements which, by possibility, any issue of his wife might inherit, the wife holds, after his death, one-third part of those lands and tenements for her natural life as an estate in dower. This seems to be the well-settled law. Now, the flats are real estate, which the issue of the wife would inherit.

The widow is not dowable of wild lands, because clearing them by cutting the trees would be deemed waste. But it would not seem to be waste to lease the flats or to permit the erection of a wharf thereon.

Exceptions overruled.

RIGHT OF PARTITION, AND PROCEEDINGS FOR: *Nichols v. Nichols*, 67 Am. Dec. 699, and note 703, treating the subject fully.

ALLEGATION AS TO UNKNOWN PARTIES, when sufficient: *Nash v. Olsch*, 78 Am. Dec. 678.

ADVERSE POSSESSION AS BAR TO PARTITION: *Harmon v. Kelley*, 45 Am. Dec. 552; *Hovey v. Goings*, 54 Id. 427, and note 432.

WHAT PROPERTY IS SUBJECT TO DOWER: *Bishop v. Boyle*, 68 Am. Dec. 615; *Goss v. Cutler*, 76 Id. 711; *Thomas v. Hesse*, 84 Id. 66.

TAINTER v. LOMBARD.

[58 MAINE, 392.]

JUDGE IS NOT BOUND TO ADOPT LANGUAGE OF COUNSEL IN GIVING LAW OF CASE TO JURY, and if it appears or may fairly be presumed from the exceptions that pertinent and correct instructions as to the points raised by the testimony were in fact given, exceptions will not be sustained on account of his refusal to do so.

UPON SALE OF PERSONAL PROPERTY BY PAROL, TITLE MAY VEST in an undisclosed principal for whom the apparent purchaser is negotiating as agent, and the principal, though unknown to the seller, may vindicate by suit in his own name his rights in the property.

REFLEVIN for a wagon. The opinion states the case.

A. W. Paine, for the plaintiff.

J. A. Peters, for the defendant.

By Court, BARROWS, J. The wagon replevied in this suit is claimed by the defendant by virtue of a sale to him from Robert B. Tainter, the plaintiff's son, and the case finds that the only question was one of title,—whether the wagon was the property of the father or the son. It was bought of Reuben Dunning. The terms of sale were agreed upon between him and the son, and he appears to have supposed that the sale was to the son, and testifies accordingly. But he required the father to sign the notes with the son, and took a mortgage of the father's oxen as security for the notes, and upon his delivering the wagon, they together took it and hauled it to a neighboring shop to be repaired. The case finds that plaintiff and his son were living together at this time, the son being a young man possessed of little or no property. The father testified that the son solicited him to purchase the wagon and procured Dunning's terms, and that before going over to Dunning's to close the trade, it was agreed between them that the father should give his note for the wagon, and that the wagon should be his until paid for by the son; that he paid the notes which were given for the wagon, and also paid for the repairs; that the son had never repaid these sums; that the wagon was used by the family from the time of the purchase, July 9, 1859, till August 30, 1862, when the son took it from the father violently while the latter was riding in it on the highway, and sold it to the defendant.

On the part of the defendant, there was testimony tending to show that the son bought the wagon and paid for it, and always held it as his own, and that the father merely signed

the note with the son as a surety. The judge instructed the jury that if the father and son, before the delivery of the wagon by Dunning, agreed between themselves that the father should hold the property as security for the payment of the note, and nothing was afterwards done about it, the title would not pass (to the father), provided the sale was made by Dunning to the son, the father signing with the son as surety.

This instruction was doubtless correct. The doctrine is simply this: that an agreement to give a mortgage or pledge, not executed, cannot be permitted to take the place of such mortgage or pledge under these circumstances.

The difficulty is, that this instruction presents the case only upon the hypothesis that the testimony offered on the part of the defendant, above referred to, was true, and that no instruction was given upon the phase of the case presented by the plaintiff's testimony, although the plaintiff's counsel requested the court to instruct the jury that "if, by agreement between the father and son, the former was to hold the property of the wagon until the son had paid for it, and the wagon was delivered to them under this agreement, the agreement would be binding, and the father would hold the property accordingly." The requested instruction was refused. The judge is not bound to adopt the language of counsel in communicating the law of the case to the jury, and provided it appears, or may fairly be presumed from the exceptions, that pertinent and correct instructions as to the points raised by the testimony were in fact given, exceptions will not be sustained on account of his refusal to do so.

In the case at bar, however, the instruction before recited, as given by the judge, is presented as the ruling of the court upon the law of the case, and not as an instruction given *inter alia*.

It would seem from the exceptions that no such instructions were given as to the vital question in the case, — viz., to whom did the property pass upon the sale by Dunning? — as the plaintiff, in view of his testimony and the requested instruction, was entitled to have.

The fault may be in the exceptions, but having been duly allowed, they are to be considered as presenting the case correctly.

For whom did the son make the bargain with Dunning? For himself, or, as agent, for his father? To whom did the property pass upon that sale? The questions are fairly raised

by the plaintiff's testimony and the requested instruction, and it was the duty of the court to aid the jury in their determination by appropriate instructions upon matters of law.

Upon a sale of personal property by parol or by writing not under seal, it is not unfrequent that the title vests, not in the apparent purchaser, but in some undisclosed principal for whom the apparent purchaser was negotiating as agent, and the authorities cited by the plaintiff's counsel in argument, and numerous others, show that the real purchaser, though unknown to the seller, may vindicate by suit in his own name his rights in the property, and also rights under contract made respecting the property by the agent, in his own name only, without disclosing his principal, provided only that the seller or party dealing with the agent is not prejudiced by the introduction of the unknown principal in place of the agent.

In the case at bar, although Dunning may have supposed, and honestly testified, that he sold the wagon to the son, this ought not to be permitted to prejudice the rights of the plaintiff, if, in point of fact, in pursuance of the agreement between the father and the son, made pending the bargain, the father became the real purchaser.

Exceptions sustained. New trial granted.

TITLE TO PROPERTY PURCHASED WITHOUT DISCLOSING PRINCIPAL VESTS IN LATTEE: *Quaking v. Rice*, 71 Am. Dec. 579, and note 581.

SUIT BY UNDISCLOSED PRINCIPAL ON CONTRACT MADE BY OR WITH AGENT: *Eastern R. R. Co. v. Benedict*, 66 Am. Dec. 387, note.

CASES
IN THE
COURT OF APPEALS
OF
MARYLAND.

DEAN v. BROWN.

[28 MARYLAND, 11.]

WHERE ONE IN POSSESSION OF LAND UNDER CONTRACT OF PURCHASE executed by the husband of one of two women, co-tenants thereof, brings a bill to enjoin a purchaser from said two women, claiming under a deed executed by them after the death of said husband, from cutting timber on said land, in which he alleges that his contract was made by the husband of said co-tenant with the consent of his wife, and that the title was still outstanding, does not show such a right to the land as would bar the entry of the grantee under the above deed; nor in view of the averments of the bill can any presumption of a grant or of adverse possession be indulged.

ADVERSE POSSESSION, WHAT CONSTITUTES. — Possession to be adverse must be accompanied with a positive and exclusive claim of the entire title; where the title claimed admits the existence of a superior title, the possession will not be adverse to that title.

POSSESSION UNDER AGREEMENT TO PURCHASE — NOT ADVERSE. — Where one contracts for land, and enters into possession under an agreement for a conveyance of the title on payment of the purchase-money, there can be no adverse holding, even if possible then, until the condition on which the conveyance depends has been performed.

The opinion contains a sufficient statement of the case.

Russum and Stockett, for the appellants.

Pratt, for the appellee.

By Court, COCHRAN, J. The injunction in this case was granted upon a bill filed by the appellee to restrain the appellants from cutting and removing the wood and timber on a tract of land called Allcock's Chance. The record shows that this land belonged to Catharine McClish and Sarah A.

Green, her sister, as tenants in common, and that while they were so seised, the latter intermarried with one William P. Kelley, who sold the land to Garretson Reese, and gave his individual bond for a conveyance thereof, in July, 1833. The death of Kelley occurred in 1844, and in December, 1858, his widow and Catharine McClish joined in a deed conveying the property in question to the appellants, who thereupon commenced to cut and remove the standing wood and timber. It also appears that Reese entered on the land at the time of his purchase from Kelley; that he cut and removed wood and timber therefrom, and, without obtaining any deed thereof or inclosing it, continued to occupy and enjoy the land in that manner until his death, in 1849. The appellee avers that after the decease of Reese his property was apportioned among his heirs at law, and that this land was allotted to his daughter Rachel, now the wife of the appellee; that she thereby came into the possession and ownership of the land, and he therefore claims in her right the relief sought by the bill.

It clearly appears, from this statement of the case, that the title of the property remained in Mrs. Kelley and her sister Catharine, notwithstanding the sale of Kelley to Reese, and that their conveyance would vest the appellants with a good title, unless, indeed, the possession of the land under the Reese purchase was so far adverse as to divest them of their estate and establish a title in those claiming under him. The question, then, as to the effect of the possession under the purchase of Reese, is the only material one in the case; and looking to the averments in the bill, all difficulty on that point would seem to be removed. The rule at law, as well as in equity, established by an unbroken course of authority, is, that possession, to be adverse, must be accompanied with a positive and exclusive claim of the entire title, and if the title claimed be subordinate to or admits the existence of a superior title, the possession will not be taken as adverse to that title; nor does it matter how long such a possession may be continued, for it can have no effect in the way of barring the legitimate title: *Smith v. Burtis*, 9 Johns. 180 [5 Am. Dec. 218]; *Jackson v. Johnson*, 5 Cow. 74 [15 Am. Dec. 433]; Angell on Limitations, 413, 414; *Stump v. Henry*, 6 Md. 201 [61 Am. Dec. 300]. And where one contracts for land, and enters into possession under an agreement for a conveyance of the title on payment of the purchase-money, there can be no adverse holding, even if possible then, until the condition on which the conveyance

depends has been performed: *Jackson v. Bard*, 4 Johns. 231 [4 Am. Dec. 267]; *Jackson v. Camp*, 1 Cow. 610; *Jackson v. Johnson*, 5 Id. 74 [15 Am. Dec. 433]; *Gwynn v. Jones*, 2 Gill & J. 173; *Colvin v. Warford*, 20 Md. 357.

In this case Reese appears to have entered into possession under a contract for a deed on payment of the purchase-money, and although the bill alleges that the purchase-money was subsequently paid, yet there is no evidence of that fact, other than the simple declaration of Reese himself to a third party, that he had paid it, and none at all as to the time when the payment was made. And although the proof is that the purchase was made from Kelley, yet the bill states that the land belonged to Mrs. Kelley, in her own right, who appears not to have been a party to the contract of sale. The appellee also avers that no deed has ever been made in compliance with the contract of Kelley, and that he and his wife have never been able to obtain one, by reason of the fraud and obstinacy of Mrs. Kelley, and that he intends to institute proceedings against the appellants, Mrs. Kelley and others, to compel a conveyance of the lands to his wife. The possession relied on thus appears to have been taken and maintained under a contract for a title which is alleged to be still outstanding; and further, that the contract for a conveyance of the title was made with one who was not the owner of the land. The rules to which we have referred are applicable to this case. It surely cannot be said that the possession of the land under the contract from Kelley was of such a character as to bar the appellants' right of entry under their deed, or raise a presumption of a grant to those claiming under that contract, for that would be inconsistent with the solemn averment in the bill that the title is still outstanding; and relying on the contract, without the aid of a presumption from adverse possession, it cannot be said that the wife of the appellee has acquired any interest in the land that a court of law or equity can protect. The contract was made with one who had no such title as the contract calls for, although possessed of an interest *jure mariti*, and as a matter of course, those claiming under it after his decease were vested with no interest adverse to that of the real owners. We think, under these circumstances, that the appellee is not entitled to the relief prayed, and shall therefore reverse the decree of the court below, dissolve the injunction, and dismiss the bill, with costs to the appellants.

Injunction dissolved and bill dismissed.

WHAT WILL CONSTITUTE ADVERSE POSSESSION OF LAND must be determined by the circumstances of each case: *Draper v. Shoot*, 69 Am. Dec. 462. To constitute adverse possession, it is necessary that the party should claim the property as his own: *Snodgrass v. Andrews*, 64 Id. 169. Adverse possession is made out by acts that are open, notorious, visible, and continuous: *Denham v. Holman*, 71 Id. 198. Visible and notorious occupation of land with intent to claim against the world renders the entry and possession adverse: *Ford v. Wilson*, 72 Id. 137; see also *Morrison v. Kelley*, 74 Id. 169.

POSSESSION UNDER BOND FOR TITLE. — One who holds possession under bond for titles made by the true owner must, if the purchase-money remains unpaid, consider himself as holding under the true owner. Consequently, such possession is not adverse to the owner, as it lacks an intention to so hold, which is necessary to constitute adverse possession: *Stamper v. Griffin*, 65 Am. Dec. 628. Possession of land under contract of purchase does not become adverse until full payment has been made, according to the terms of the agreement: *Drew v. Towle*, 64 Id. 309. One entering not adversely, but expressly or legally in subservience to owner's title, cannot be permitted to treat his subsequent continued possession as adverse; but before the statute commences to run in his favor, the privity between him and the owner must have been disowned and severed by some unequivocal act: *Bannon v. Brandon*, 75 Id. 655. A purchaser from one who holds under an agreement to sell may hold adversely: *Robertson v. Wood*, 65 Id. 140.

GENT v. LYNCH.

[28 MARYLAND, 53.]

SLANDER OF TITLE — MALICE — ADVICE OF COUNSEL. — Where plaintiff brings an action against defendant for slander of his title to certain land, and the evidence showed that plaintiff offered the land for sale at auction; that defendant was present and forbade the sale, declaring that plaintiff had only a dower interest in the land, and that the title was in himself; that in so declaring defendant was acting under advice of counsel, but that such advice was procured by false representations made to his counsel by defendant, — it is proper for the court to submit the question of the latter's malice or *bona fides* to the jury.

WHERE DEED USED AS EVIDENCE IS NOT CONTAINED IN TRANSCRIPT, and the clerk certifies that it is not on file in the court below, this court will presume in the absence of the deed that the rulings of the circuit court with regard to it were correct.

TENANTS IN COMMON MUST JOIN IN ACTIONS FOR TRESPASS TO LANDS, but their failure to do so can only be taken advantage of by plea in abatement, or by way of apportionment of the damages at the trial.

POSSESSION NECESSARY TO MAINTAIN TRESPASS. — The gist of the action of trespass is the injury done to the plaintiff's possession, and therefore, in order to maintain it, possession is necessary. This possession may be either actual or constructive; the mere right of entry on the lands is not sufficient, if they be in the actual possession and occupancy of a disseisor.

POSSESSION OF WILD UNINCLOSED LAND TO MAINTAIN TRESPASS. — Where defendant has entered upon an outlying uninclosed lot of plaintiff's, and

has cut and sold wood off it from time to time, these were mere successive acts of trespass, and the title being in plaintiff, the constructive possession is in her, and she may maintain trespass against defendant.

THE opinion states the case.

Carter and Boorman, for the appellant.

Machen and Gittings, for the appellee.

By Court, BARTOL, J. This action was instituted by the appellee. The first and second counts of the declaration are in case for slander of the plaintiff's title to a parcel of land situate in Baltimore County, containing about twenty-three acres, being part of a tract called Stansbury's Plains, and distinguished by the name of Nackey Ford's Lot. The third count is in trespass for breaking and entering the same land and cutting and carrying away wood. The defendant pleaded not guilty. The jury found a general verdict for the plaintiff.

At the trial below the plaintiff offered one prayer, which was granted, and the defendant twelve, of which the first, fourth, eighth, and tenth were granted, and the others refused; the defendant excepted.

The eighth, ninth, and twelfth prayers refer to the first two counts of the declaration, and will first be considered.

The ninth prayer asserted that the plaintiff had failed to offer any evidence of malice upon the part of the defendant in forbidding the sale, or want of probable cause in the defendant making the declarations offered in evidence in reference to said sale. This makes it necessary to refer to the proof.

Evidence was given that the plaintiff offered the property for sale at public auction in 1859, that the defendant was then present and forbade the sale, declaring that the plaintiff had only a dower interest in the land, and had no right to sell it, and that it belonged to him.

It further appeared from the evidence that the defendant had been advised by Mr. Boorman, his counsel, to forbid the sale. Evidence was given that the land had been sold by a constable, and the defendant had bought it; but Mr. Boorman testified that his advice was given upon the representations made to him by the defendant, "that he had purchased the property and owned it, and that the sale made to him by the constable had been reported to the court and ratified; which statement he, Mr. Boorman, afterwards found, by an examination of the papers, to be false; the sale by the constable had not been ratified, but had, in fact, been rescinded and set

aside." Mr. Boorman further testified that "when he afterwards informed the defendant of the true state of the case, he said he had been altogether misinformed, but admitted he had never paid the purchase-money."

Upon this proof we think the circuit court was right in submitting to the jury the question of malice and *bona fides* on the part of the defendant. This was done by the eighth prayer, granted by consent; and there was, consequently, no error in rejecting the ninth prayer.

In our opinion, the twelfth prayer was properly rejected also; the law upon the subject was correctly given to the jury in the eighth prayer.

It is stated in the bill of exceptions that the plaintiff offered in evidence a deed from the heirs of George Lynch to the plaintiff. The deed itself is not contained in the transcript, the clerk certifying that it is not on file in the court below. In the absence of the deed, it must be presumed that the rulings by the circuit court with regard to it are correct, and therefore this court cannot say there was error in rejecting the second and third prayers.

There remain for our consideration the fifth, sixth, seventh, and eleventh prayers, and the instruction granted to the jury on the prayer of the plaintiff.

The fifth prayer asserts the proposition that the plaintiff, being only tenant in common of the land, could not maintain the action without joining her co-tenants.

The general proposition that in personal actions, as for trespass to lands, tenants in common must join, is supported by the authorities cited by the appellants on this point, and is no doubt well established. The rule is correctly stated in 1 Ch. Pl. 65. The same author, page 66, says: "In actions in form *ex delicto*, and which are not for the breach of a contract, if a party who ought to join be omitted, the objection can only be taken by plea in abatement, or by way of apportionment of the damages at the trial." See also note 1, same page, and 1 Wms. Saund. 291 k, 291 m, note 4. We conclude that there was no error in rejecting the fifth prayer.

The only remaining question to be determined is, whether the facts offered in evidence by the defendant operated a disseisin of the plaintiff, which bars her right of action, notwithstanding the title to the land is in her. This question arises upon the sixth, seventh, and eleventh prayers of the defendant, and the prayer of the plaintiff.

Upon this question an examination of the authorities has brought us to the following conclusions:—

1. The gist of the action of trespass is the injury done to the plaintiff's possession. In order to maintain the action, therefore, possession by the plaintiff is necessary. This possession may be either actual or constructive; a mere right of entry on lands is not sufficient, if they be in the actual possession and occupancy of a disseisor. The law is correctly stated by Greenleaf, in his excellent work on evidence, vol. 2, sec. 619, where it is said: "A disseisee, though he may maintain trespass for the original act of disseisin, cannot have this action for any subsequent injury until he has acquired the possession by re-entry."

2. Though "at one time it was doubtful whether the action of trespass *quare clausum fregit* would lie at all where there was no actual possession, and the *locus in quo* was in a wild, unoccupied state, yet it has long been settled in this country, from the necessity of the case, not that the action will lie without possession, but that it will lie upon that possession which the law implies to be in the owner of land, when no other person is, in point of fact, on it. In such case the owner has constructively the possession": Ruffin, C. J., in *Cohoon v. Simmons*, 7 Ired. 190.

This is the meaning of the general expression used by the court in *Norwood v. Shipley*, 1 Har. & J. 295, and in several other cases cited in argument: that in order to maintain the action, it is necessary for the plaintiff to prove title to the land, or that he was in the actual possession at the time of the alleged trespass.

Upon an examination of the proof in this case, a majority of the court are of opinion that there was no such evidence of the disseisin of the plaintiff, or of the adverse possession of the land by the defendant, as to defeat the action.

The evidence is, that the land was an outlying, unclosed lot, not at any time in the actual possession of the defendant, in such manner and by such acts of exclusive user and ownership as to establish an adverse possession in law, necessary to constitute an ouster or disseisin of the owner. The only possession proved is, that "the defendant has cut and sold wood off it from time to time." These were mere successive acts of trespass, nothing more. The title being in the plaintiff, the constructive possession was in her, and she was therefore entitled to maintain the suit.

Finding no error in the action of the circuit court, the judgment will be affirmed.

Judgment affirmed.

POSSESSION, NECESSARY TO MAINTAIN TRESPASS: *Ware v. Collins*, 72 Am. Dec. 122; *Bird v. Liebro*, 70 Id. 617; *Fuhr v. Deam*, 69 Id. 484, and notes to these cases.

THE PRINCIPAL CASE IS CITED to the point that possession either actual or constructive is necessary to maintain trespass, in *Baltimore and Ohio R. R. Co. v. Boyd*, 63 Md. 332.

ACTION FOR SLANDER OF TITLE. — This action, in its nature, is not properly for words spoken or for a libel written or published, but is in the nature of an action of trespass on the case for special damages sustained by reason of the speaking or the publication of the slander of the plaintiff's title. The cause of action is denominated slander of title by a sort of figure of speech in which the title is personified and made subject to many of the rules applicable to personal slander when the words themselves are not actionable. "The gravamen of the action is the slander of plaintiff's title. It is publishing language, not of the person, but of his right or title to something. Things are merely external to the person, and include whatever one may or may be entitled to own, possess, or enjoy. But one may speak or write whatever he may please concerning a thing, and with any intention towards the thing, and for such speaking or writing no action can be maintained. The thing cannot complain; it has no rights to be invaded. But although things may have no rights, persons may have a right in or to a thing, — the right of property, — and this right may be invaded by language concerning the thing. When this invasion occurs, the language which affects a thing is actionable": *Edwards v. Burris*, 60 Cal. 157; *Townshend on Slander and Libel*, sec. 204; *Meyroos v. Adams*, 12 Mo. App. 329. When defamatory or discommendatory language is spoken or written concerning a person, it is always, in the absence of any evidence to the contrary, regarded as uncalled for, and is presumed to be malicious and false. But as to language concerning a thing no such presumption is indulged, and upon those who allege language concerning a thing to be false and malicious is the burden of establishing those conclusions by other evidence than that afforded by a mere publication of the language: *Townshend on Slander and Libel*, sec. 130. In actions for slander of title malice is not presumed: *McDaniel v. Baca*, 2 Cal. 326; S. C., 56 Am. Dec. 339. To maintain the action, the words must not only be false, but they must be uttered maliciously, and be followed as a natural and legal consequence by a pecuniary damage to the plaintiff, which must be specially alleged in the declaration and substantially proved at the trial. Malice is the gist of the action: *Kendall v. Stone*, 5 N. Y. 14; *Like v. McKinstry*, 41 Barb. 186; *Van Tuyle v. Riner*, 3 Bradw. 556; *Andrew v. Deakler*, 43 N. J. L. 16; S. C., 45 Id. 168; *Meyroos v. Adams*, 12 Mo. App. 332; *Walkley v. Bostwick*, 49 Mich. 375; *Edwards v. Burris*, 60 Cal. 161; *Hovey v. Rubber Tip Pencil Co.*, 87 N. Y. 119; *Stark v. Chitwood*, 5 Kan. 141; *Pauli v. Halferty*, 63 Pa. St. 49. Unless plaintiff shows title or interest in the property, falsehood and malice in the utterance of slander concerning it, and an injury to the plaintiff, there is no cause of action: *Edwards v. Burris*, 60 Cal. 161. The words charged as actionably slanderous must be set out in the declaration: *Hill v. Ward*, 13 Ala. 310. The special damages sustained must be circumstantially alleged: *Stark v. Chitwood*, 5 Kan. 141. The real point on the question of malice is

whether the defendant made the statement *bona fide*, and under an honest impression of its truth, or whether he made it maliciously for the purpose of slandering the plaintiff's title. If the defendant has any interest in the matter, and asserts defect of title *bona fide* in order to protect himself, or to prevent the commission of a fraud, the burden is thrown on plaintiff to show that there was no reasonable or probable ground for the statement. Defendant may show that he believed the statement, and that he made it in good faith and without malice, under a *bona fide* claim of property, or under circumstances that made the statement privileged. There must be want of probable cause. If what the defendant says or does is in pursuance of a claim of title, he is not responsible: *Bailey v. Dean*, 5 Barb. 297; *Meyroos v. Adams*, 12 Mo. App. 334; *Andrews v. Deahler*, 45 N. J. L. 168; *Hill v. Ward*, 13 Ala. 311; *Van Tuyle v. Riner*, 3 Bradw. 556. In order to rebut the presumption of malice, defendant may prove that upon a fair representation of his claim he was advised by counsel that his title was as he had asserted: *Hill v. Ward*, 13 Ala. 310; *Stark v. Ohtwood*, 5 Kan. 145. The action for slander of title lies as well for false representations regarding personalty as realty: *Lids v. McKinstry*, 41 Barb. 186; or for such representations respecting letters patent: *Meyroos v. Adams*, 12 Mo. App. 332.

GROOME v. LEWIS.

[23 MARYLAND, 187.]

ATTACHMENT—FUNDS IN HANDS OF TRUSTEE IN EQUITY are not, as a general rule, liable to attachment and condemnation until the share of the debtor has been ascertained by a statement of the trustee's trust and the settlement of his final account.

RULE THAT ATTACHMENT WILL NOT LIE TO AFFECT FUNDS IN HANDS OF TRUSTEE, before the settlement of his accounts, rests altogether on jurisdictional considerations sufficient for the defense of a trustee as garnishee, as well as for the protection of the fund in his hands; but it is evident that these are purely matters of defense, of which the trustee should avail himself by motion, pleadings, or proof at some stage of the attachment proceedings, before the final judgment. The trustee is not required to plead these facts specifically, but they should be disclosed to the court by some party to the proceeding before the matter is concluded by a judgment.

WHERE FUNDS IN HANDS OF TRUSTEE HAVE BEEN ATTACHED BEFORE SETTLEMENT OF HIS ACCOUNTS, and the debtor's share ascertained, and such proceedings allowed to ripen into a judgment of condemnation, if the time within which errors can be assigned and corrected has passed, the judgment will be held final and conclusive of the rights established by it; and the fact that the garnishee had a good defense, or that he was clothed with a privilege protecting his fund from attachment, cannot now be inquired into.

NOT INTENDED FOR PROTECTION OF DEBTORS.—**RULE THAT FUNDS IN HANDS OF TRUSTEE** cannot be attached until his accounts have been settled, and the debtor's share ascertained, is not intended as a device for the benefit of debtors, nor to protect their interest in trust funds from the appropriate remedies of their creditors, and is only applied where the existing

facts and circumstances justify it, and will never be applied after there has been a final account and an order to the trustee to pay accordingly.

ATTACHMENT AGAINST FUNDS IN CHARGE OF TRUSTEE may be issued and laid in his hands before the settlement of his accounts and the ascertainment of the share of the debtor, but it is not effective so as to subject the fund to condemnation until after the settlement of such account.

ATTACHMENT LAID IN HANDS OF TRUSTEE BEFORE FINAL ACCOUNT WILL BE GOOD, if at any time before trial or judgment the share of the fund in hand belonging to the debtor is ascertained by a final account.

PROCESS OF ATTACHMENT OR GARNISHMENT, WHEN PURSUING CREDITS, UNLIKE ORDINARY SUITS, does not necessarily relate back to the service of the writ, but may stand on the state of facts appearing at the time.

JUDGMENT ENTERED ON GARNISHMENT OF FUNDS IN HANDS OF TRUSTEE, before his accounts have been settled, will be final and effective on the fund afterwards ascertained, if before that time no motion or other proceeding has been taken to correct that irregularity in the entry of the judgment. The ascertainment of the specific fund upon which the judgment takes effect cures the irregularity of entering it before the final account.

THE opinion states the case.

Chambers and Creswell, for the appellants.

Archer, for the appellee.

By Court, COCHRAN, J. The question to be considered in this case arises on the following facts: A sale of certain real estate was made by George Earle, as trustee, under a decree passed by the court below, on a bill filed by Sarah C. Earle against the appellee and one Edward J. Cannon. The proceeds of sale, to which in part the appellee was entitled, were duly reported for distribution; but before his share was ascertained by the statement and ratification of the final account, the appellants, being his creditors, sued out attachments for the amount of their respective claims, and caused them to be laid in the hands of Mr. Earle, the trustee. Counsel, professing to act for the appellee, and for the protection of his interest in the fund derived from the sale, entered their appearance for the garnishee, and after continuing the cases for several terms, consented to judgments of condemnation. The amount allowed the appellee by the account was \$1,622.06; and in his proceedings taken to compel the trustee to apply the proceeds of sale as directed by the final order of ratification, he assumes that this sum should be paid to him regardless of the claims of the appellants on their judgments of condemnation. At the hearing below, the court, holding that he was entitled to the fund, passed a decree directing its payment, and in reviewing that decree, we are required to deter-

mine whether the fund is within the operation and effect of these judgments. This question is an important one, and not altogether free from difficulty.

The appellee, to establish an exclusive right in himself to the sum allowed by the account notwithstanding the judgments, relies on the general rule, that funds in the hands of a trustee in equity are not liable to attachment and condemnation before the statement and ratification of a final account. The appellants, on the contrary, contend that this rule does not apply in this case, and that it cannot be invoked in this proceeding for the purpose of relieving the fund in question from the operation and effect of their judgments. The reasons assigned for the rule, in the reported cases, unquestionably indicate, if they do not expressly prescribe, the time and circumstances when and under which it should be asserted, and a brief notice of them in that connection would seem to be appropriate here. The question was considered in the case of *Cockey v. Leister*, 12 Md. 124 [71 Am. Dec. 588], where, on the authority of the cases of *Farmers' Bank of Delaware v. Beaton*, 7 Gill & J. 421 [28 Am. Dec. 226], and *Bentley v. Shrieve*, 4 Md. Ch. 412, the court said that an attachment would not lie to affect funds in the hands of a trustee in equity before an order of distribution on a final account: 1. Because the power of the court over the fund is such as to suspend the privilege under the attachment laws, to which the trustee, as garnishee, would otherwise be entitled, of confessing judgment for the amount in hand, with an allowance of his costs therefrom, and also prevent him from responding to a judgment of condemnation except out of his own estate; and 2. Because the interference by the process of one court with funds in the custody of another would result in confusion and conflict of jurisdiction.

The rule insisted on thus appears to rest altogether on jurisdictional considerations sufficient for the defense of a trustee as garnishee as well as for the protection of funds in his hands from condemnation; but it is manifest from the nature of the case, whether we look to the jurisdiction to which the fund is subject or the resulting privilege of the trustee holding it, that these are purely matters of defense, of which the trustee should avail himself, by motion, pleadings, or proof, at some stage of the attachment proceeding before the final judgment. He is not, however, required to plead these facts specially, either for his own protection or that of the fund in his hands, but they should be so disclosed that the court hav-

ing jurisdiction of the attachment may take notice of them before the cause is concluded by a judgment. But does this record show any such state of case? On the contrary, there is nothing in these proceedings to show that the garnishee made any defense whatever, or that the counsel who appeared for him in the interest of the appellee, and assented to the judgments of condemnation, made any; nor do the extracts from the records of the attachment cases, produced by the appellants as the foundation of their claims to this fund, disclose any fact in regard to its character or condition, nor of the garnishee's relation to it, upon which error in the judgments can be predicated. Even if it were otherwise, the period within which errors could have been assigned or irregularities corrected has passed long since, and these judgments, like others pronounced by courts of competent jurisdiction, must be respected as final and conclusive on the rights ascertained and established by them. The fact that the garnishee had a good defense, or that he was clothed with a privilege sufficient to protect him from liability to the attaching creditors, cannot be inquired into here for the purpose of setting aside the judgments, or releasing him from their proper legal effect: *Raborg v. Hammond*, 2 Har. & G. 42; *Powles v. Dilley*, 9 Gill, 222; *Prather v. Prather*, 11 Gill & J. 110; *Peters v. League*, 13 Md. 58 [71 Am. Dec. 622]; *Boyd v. Chesapeake and Ohio Canal Co.*, 17 Id. 195 [79 Am. Dec. 646]. But it is said that these judgments, even if binding on the garnishee, do not affect the fund in dispute, and, to that extent, that they should be treated as nullities, under the rule relied on by the appellee. This proposition, if true in this case, unquestionably gives a more comprehensive operation to the rule than the reasons on which it is founded would seem to justify.

So far as we can understand, it is not a device for the benefit of debtors, nor can it be said to contemplate in any way the protection of their interests in trust funds from the appropriate remedies of their creditors, nor can they derive any incidental advantage from the rule, except in cases where the existing facts or circumstances are such as to justify its application; and the rule cannot be applied, as was said in *Cockey v. Leister*, 12 Md. 124 [71 Am. Dec. 588], after there has been a final account and an order to the trustee to pay accordingly. The theory of the appellee would thus seem to be untenable, for the state of facts upon which the rule might have been availed of no longer exists. His share of the fund

arising from the sale of the real estate was ascertained by a final account long before he filed his petition against the trustee for its payment to him; and as he nowhere denies his indebtedness to the appellants, nor pretends that he has been deprived of any real defense to their claims, it is neither reasonable nor just that he should have the benefit of an objection to their judgments which could not be made if the cases in which they were entered were still open.

But trying the objection by a more accurate test, we find that it does not go to the issue and service of the writs, but simply to the judgments; and that, indeed, is as far as the objection could go consistently with the views expressed in the case of *McPherson v. Snowden*, 19 Md. 197. After reviewing the cases of *Farmers' Bank of Del. v. Beaton*, 7 Gill & J. 421 [28 Am. Dec. 226], *Bentley v. Shrieve*, 4 Md. Ch. 412, and *Cockey v. Leister*, *supra*, this court said that they did not understand from them that an attachment could not be issued and laid in the hands of a trustee before a final account; but that it would not be effective,—that is, would not subject the fund to condemnation before that time.

It surely cannot be doubted that an attachment laid in the hands of a trustee before a final account would be good if at any time before trial or judgment the share of the fund in hand belonging to the debtor is ascertained by a final account. This process, certainly, when pursuing credits, unlike ordinary suits, does not necessarily relate back to the impetration or service of the writ as the time of taking effect, but may stand on the state of fact appearing at the time; and in the case supposed the account would enable the trustee to confess the amount in hand, as well as respond to a judgment of condemnation, without prejudice to himself or contempt of the jurisdiction to which the fund had been subject; and we can discover no appreciable reason why the issue and laying of the attachment before an account is stated should afterwards bar a condemnation of the fund. And if an attachment may be laid in the hands of a trustee before a final account, upon which a fund thereby ascertained may afterwards be condemned, we may conclude with equal reason that a judgment entered before the account is stated would be final and effective on the fund afterwards ascertained, if before that time no motion nor other proceeding has been interposed or taken to correct that irregularity in the entry of the judgment. The ascertainment of the specific fund upon which the judgment takes effect cures the irregularity of entering it before the final

account, and presents a case where the ground of objection has ceased to exist, and would not avail for any purpose, if the attachment were still pending. Even if the previously existing irregularity were properly subject to correction on a motion to strike out, the attaching creditor could have the case brought up by regular continuances, and demand a condemnation of the fund shown to be in the hands of the trustee by the final account. The result, however, is altogether different when, upon a full disclosure of the condition of the trust fund, the prosecution of an attachment laid in the hands of a trustee results in a judgment adverse to the attaching creditor before a final account; for there the failure to obtain a judgment of condemnation is an entire failure of the remedy.

The most, therefore, that can be said of these judgments is, that if the matter of defense suggested here had been relied on at the proper time their entry would have been irregular; but it does not follow, as we have seen, that they should now be treated as nullities for any of the purposes of these proceedings. There was no effort to correct them while they were subject to objection on the ground of the alleged irregularity, and so far as this record shows, no equitable reason has been assigned, nor is it pretended that any exists, for denying to them the absolute and conclusive effect of final judgments.

We think, upon a full and careful consideration of the whole case, that the fund in dispute is subject to the appellant's judgments, and that they are entitled to have it appropriated to their satisfaction. We shall therefore reverse the decrees of the court below, with costs to the appellants, and remand the cause, so that it may be concluded in conformity with this opinion.

BARTOL, J. I was prevented by indisposition from hearing the whole argument in this case, and therefore could not participate in its decision. But having had an opportunity of examining the questions involved, and of uniting with my brothers in consultation upon the case, concur with them in the foregoing opinion and the reasoning on which it rests.

Decree reversed and cause remanded.

ADMINISTRATOR MAY BE GARNISHED FOR SUM IN HIS HANDS, which on a settlement he has been adjudged to pay over: *Richards v. Griggs*, 57 Am. Dec. 240. Fund in receiver's hands is not attachable, being subject to order of the court, and in the custody of the law: *Adams v. Haskell*, 65 Id. 491; see the note to *Cockey v. Leister*, 71 Id. 588, for cases discussing this rule; also *Hinckley v. Williams*, 48 Id. 642.

BOWER v. HOFFMAN.

[28 MARYLAND, 268.]

DUE DILIGENCE — PRESENTMENT OF CERTIFICATE OF DEPOSIT, PAYABLE ON DEMAND. — Defendant sent plaintiff a certificate of deposit, payable on demand, in payment of a debt. Plaintiff received and acknowledged the receipt thereof, and used and negotiated the certificate for fifteen days, when the bank issuing the certificate failed, and it was presented and protested. Mail communication between plaintiff and the bank occupied but two days. *Held*, that plaintiff had not used due diligence, and could not recover from defendant.

PAYMENT — SANCTION OF DEPOSIT IN BANK. — Where defendant deposits in a bank the amount of his debt to plaintiff, and sends him the bank's certificate of deposit, which plaintiff accepts and acknowledges receipt of, and uses for his own purposes, he sanctions the deposit as a payment to himself, and makes the bank his own agent to hold the sum subject to his order.

THIS case was submitted to the jury upon an agreed statement of facts, of which the following is the substance: That at all the times during which the transactions in this case occurred, plaintiff resided in Cincinnati, Ohio, and defendant in Baltimore, Maryland; that defendant, being indebted to plaintiff in the sum of \$206.31, on the sixteenth day of October, 1860, deposited that amount in the banking-house of Josiah Lee & Co., and received from them their certificate of deposit, payable on demand. Defendant immediately, on the day of its date, sent this certificate to plaintiff, who received it on the 18th of October, and wrote to defendant acknowledging its receipt. Plaintiff negotiated this paper, and it passed through four several hands before it was presented for payment; that Josiah Lee & Co. failed on the thirtieth day of October, 1860, up to which time they regularly carried on their banking business, and paid debts and liabilities in the usual course of their business. Said certificate was not presented for payment until after Lee & Co. had failed, and on the 2d of November, when it was duly protested, and the proper notices given. Mail communication between Cincinnati and Baltimore required two days. The remaining facts appear from the opinion.

McLaughlin, for the appellant.

Hinkley and Morris, for the appellee.

By Court, GOLDSBOROUGH, J. This case was submitted to the court and jury upon the admitted statement of facts set out in the record. At the trial, the defendant offered a prayer,

which, after reciting all the facts in the case, asked the court's instruction that the plaintiff did not use due and reasonable diligence in demanding payment of the certificate of deposit, and was not entitled to recover; which instruction the court gave, and the plaintiff excepted. The court then, of its own motion, instructed the jury that there was evidence from which they might find that the plaintiff adopted the payment to Josiah Lee & Co. as payment to himself, and if they did so find, the verdict must be for the defendant. To this instruction the plaintiff also excepted.

We think the appellee's prayer was properly granted. It appears from the evidence that it required but two days to transmit a communication from Cincinnati to Baltimore; and the appellant not having made demand of payment of the certificate of deposit until the fifteenth day after his acknowledgment of its receipt, he did not use due and reasonable diligence. We are also of opinion that the instruction given by the court was correct.

Though the money deposited by the appellee was not deposited by the authority of the appellant, or with his previous knowledge, yet upon his acknowledgment of the receipt of the certificate, he sanctioned the deposit as a payment to himself, especially as he made use of the certificate for his own purposes, and thus made Josiah Lee & Co. his agents, to hold the fund, subject to his order. The appellant thus assuming control of the fund, it must be regarded as a payment of the debt due to him by the appellee.

Judgment affirmed.

PAYMENT IN NOTES, CHECKS, ETC. — Check given for debt is no payment unless the drawer has funds in the bank on which it is drawn, and unless the bank is solvent, even though a receipt is given in exchange therefor in accordance with a custom between the parties: *Taylor v. Wilson*, 45 Am. Dec. 180. Negotiable draft taken for pre-existing debt is payment thereof: *Bangor v. Warren*, 56 Id. 657. Giving promissory note for simple contract debt is *prima facie* evidence of payment: *Shumway v. Reed*, 56 Id. 679; *Melledge v. Boston Iron Co.*, 51 Id. 59; *Lowell v. Lowell*, 36 Id. 352; *Perrin v. Keene*, 36 Id. 759; *Newall v. Hussey*, 36 Id. 717. When promissory note is payment: See *Tyner v. Stoops*, 71 Id. 341; *McMurray v. Taylor*, 77 Id. 611; *Blunt v. Walker*, 78 Id. 709, and notes.

BANK CHECK IS NOT PAYMENT UNTIL CASHED without an agreement to receive it as such: *Barnet v. Smith*, 64 Am. Dec. 290. Payment in genuine bank notes circulating as currency is binding, and the loss falls upon the receiver where the bank suspends immediately after payment: *Ware v. Street*, 75 Id. 755, and notes.

THOMAS. v. KNIGHTON.

[23 MARYLAND, 318.]

ADMINISTRATION DE BONIS NON. — Statute providing for letters *de bonis non* at the discretion of the court, giving preference to the person entitled, if he shall actually apply for the same, does not mean that the orphans' court may capriciously appoint whom it pleases, when it pleases, without notice or opportunity to be heard to those entitled to make application; the statute necessarily imports that the person entitled shall have notice and a day in court to make such application.

IN APPLICATION FOR ADMINISTRATION DE BONIS NON, the same reason requiring notice to those entitled to administration in the first instance applies to this latter application, as the completion of an administration is often more important to all concerned than the commencement

WHERE WOMAN IS ENTITLED TO ADMINISTRATION AND RENOUNCES HER RIGHT, and recommends the appointment of another as administrator *de bonis non*, who is appointed as such without notice, and where she afterwards petitions the court for restoration, claiming that her renunciation was procured by mistake, the court, upon being satisfied of the mistake, should cancel its appointment and restore her to her right of administration, and it is error to appoint the one next entitled pending the hearing of her petition.

WHERE, PENDING APPEAL FROM ORDER APPOINTING ADMINISTRATOR DE BONIS NON, but before the appeal bond is filed, upon the petition of the appointee the court makes an order associating another person with him in the administration, such order, not being one which would prevent the court from conforming to the decision of the court of appeals, is not stayed by the first appeal, but being a modification of the order first appealed from, must stand or fall with it.

THE opinion states the case.

Holloway, for the appellant.

Hinkley, for the appellee.

By Court, BOWIE, C. J. Two questions are presented by the appeals in this case: 1. Whether, in granting letters of administration *de bonis non*, the orphans' court may, in their discretion, select any competent person, without first summoning those who would be entitled on an original application for administration; 2. Whether, an appeal having been taken from an order revoking the letters *de bonis non* and appointing another, the orphans' court, pending that appeal, but before an appeal bond executed, can, on application of the next of kin, modify the order appealed from by uniting another in the administration.

The testator, William Young, died on the 26th of October, 1857, having made his will and constituted his widow, Maria, and his son, William H., his executors, and devising and bequeathing considerable estate, real and personal, to his grand-

son, the appellee. The widow renounced her right to the executorship on the 7th of December, 1857, and letters testamentary were granted to the son, who died on the 22d of June, 1864, leaving his testator's estate in part unadministered. On the 9th of August, 1864, a renunciation of the widow, with a request that administration *de bonis non* should be granted to the appellant, was filed in the orphans' court, who granted letters on the same day to the appellant, without summons or notice to the appellee. Soon after (when does not appear), the widow filed a petition, alleging her renunciation was procured by mistake, and praying the letters granted might be revoked. Pending which, on the 17th of September, 1864, the appellee filed his petition, claiming as a grandchild of the testator a right to the administration *de bonis non*, in the event of his grandmother's refusal, alleging her renunciation had been obtained by mistake, and praying the letters *de bonis non* granted thereon might be revoked.

The appellant and Maria Young, the widow, were made parties to this petition; the former appeared and answered; the latter was not summoned, and did not appear. After proof that the appellee was the only grandson of the testator and devisee under his will, that William H. Young left neither children nor grandchildren or other descendants, that Maria Young, the widow, is living, and the appellee resided in the city, the orphans' court, on the 29th of September, 1864, revoked the letters *de bonis non* granted the appellant, and ordered letters *de bonis non* to be issued to the appellee. From which decree an appeal was entered on the 1st of October, 1864, and bond filed on the 27th of October ensuing.

In the interval between the passage of the first order and the filing of the appeal bond, on the 11th of October, 1864, the appellee filed his petition, praying that Edward O. Hinkley, Esq., be associated with him in the administration, which petition was granted by an order passed the same day, from which an appeal was also prayed, etc.

The case of *Stockdale v. Conway*, 14 Md. 99-107 [74 Am. Dec. 515], referred to by the counsel on each side, is as nearly coincident with the present as is possible; and if it had been decided under the provisions of the code, instead of the testamentary system of 1798, chapter 101, would be conclusive. These provisions are, however, so similar, that any judicial interpretation of the one must materially affect the other. They are in this respect substantially the same.

The parties entitled to the administration were a brother and sister. The former renounced his right, and recommended the son of the deceased executor, who was appointed administrator *de bonis non*. The sister filed her petition sixty-eight days after, praying the letters of administration might be revoked, and it was held that they should be revoked, the parties in interest summoned, and the question decided according to the provisions of the testamentary system. The sections of the act of 1798, c. 101, regulating the subject of renunciation and granting letters *de bonis non* are subchapter 14, section 1, and subchapter 5, section 6. The former provides, "that if any person entitled to administration shall deliver or transmit to the orphans' court a declaration, in writing, that he is willing to decline the trust, the court shall proceed as if such person were not entitled"; and the latter, "in case any executor," etc., "shall die before the estate shall be fully administered, letters of administration *de bonis non* shall be granted to the person entitled, agreeably to the rules hereinbefore laid down, and the proceedings shall be in all respects the same as if administration had been originally granted": 1798, c. 101, subc. 5, sec. 6.

The seventieth section of article 93, code, enacts: "If an executor or administrator shall die before administration is completed, letters *de bonis non*, or *de bonis non cum testamento annexo*, may be granted at the discretion of the court, giving preference, however, to the person entitled, if he shall actually apply for the same." To ascertain who are the persons entitled, and the meaning of the terms "actually apply for the same," we must refer to the thirty-first and thirty-third sections of the same article. The former, the thirty-first, describes the order in which next of kin shall be entitled, viz.: "If there be neither husband nor wife, nor child, nor grandchild," etc., "or if these be incapable, or decline or refuse to appear, on proper summons or notice, administration may be granted at the discretion of the court." The thirty-third, prescribing notice, says: "It shall not be necessary to give notice to a party entitled to administration if he be out of the state, nor shall it be necessary to summon or notify collateral relations more remote than brothers or sisters of the intestate, in order to exclude them from administration; and no relations, except a widow, child, or grandchild, father, brother, sister, or mother, shall be considered entitled, unless they shall apply for the same."

The widow, child, and grandchild, and others in that class, are entitled under these sections, whether they apply or not, unless they be incapable, or decline, or refuse to appear, on proper summons or notice.

The seventieth section, providing for letters *de bonis non*, at the discretion of the court, giving preference to the person entitled, if he shall actually apply for the same, must be construed in the spirit of the preceding sections. Its language, literally interpreted, cannot be gratified without supposing a notice or opportunity given to actually apply, before granting the letters of administration *de bonis non*, or an obligation on the court to revoke, in case an application be made within a reasonable time thereafter.

The seventieth section, construed in connection with the thirty-first and thirty-third, cannot mean that the orphans' court may capriciously appoint whom they please, when they please, administrator *de bonis non*, without notice or opportunity to those entitled of making application. The injunction, "giving preference, however, to the person entitled, if he shall actually apply for the same," necessarily imports that such person shall have a day in court to make such application. It would otherwise be unmeaning. "The right to administer upon the estate of a deceased relative is a highly valuable one, which cannot be delegated. The policy of the law, in selecting persons nearest in interest, in preference to others more remote, was to bind up the interest of the administrator with that of persons entitled to the estate": *Ex parte Young*, 8 Gill, 286. The completion of an administration is often more important to all concerned than the commencement. No reason can be assigned for requiring the parties entitled to be summoned in the first instance that does not apply to the second.

The thirty-eighth section of the same article enjoins: "If any person entitled to administration shall deliver or transmit to the orphans' court a declaration in writing that he is willing to decline the trust, the court shall proceed as if such person were not entitled."

Mrs. Young, the widow of the deceased, being first entitled to the administration *de bonis non*, it would have been premature and presumptuous in Mr. Knighton to have applied before she had renounced, and when she had declined it was the duty of the court to have summoned the person next entitled. No other construction is consistent with an impartial administration of justice. *Ex parte* proceedings are inequitable, unfair, and oppressive.

It was necessary for the orphans' court to decide upon the petition of Mrs. Young against the appellant before granting letters to the appellee; because if Mrs. Young executed her renunciation by mistake, the court, upon being satisfied of that fact, would cancel the same, and restore Mrs. Young to her right of administration. The orphans' court were therefore right in revoking the letters of the appellant, but in error in granting them to the appellee.

The order of the 11th of October, 1864, which is the subject of the second appeal, being such as would not prevent that court from conforming to the decision of the court of appeals, whether that decision was eventually for or against the appellant, was not stayed by the first appeal, but being a modification of the order first appealed from, must stand or fall with it; the first being premature and erroneous, for the reasons assigned, the second is equally so.

The decree of the orphans' court revoking the letters of the appellant will be affirmed, but so much of the same as direct letters to be granted to the appellee, and to the appellee and Edward O. Hinkley, Esq., is reversed.

Affirmed in part, and reversed in part, and remanded for further proceedings.

BALTIMORE STEAM PACKET CO. v. SMITH.

[28 MARYLAND, 402.]

COMMON CARRIER—LOSS OF BAGGAGE ON ONE OF TWO CONNECTING LINES—EVIDENCE OF DELIVERY TO SECOND.—In going from one city to another, plaintiff traveled part of the way by steamboat and the remainder by railroad. He delivered his trunks to the steamboat company, received a check therefor, which he presented at the end of the railroad, where the trunks could not be found. In an action against the steamboat company for the value of the trunks, evidence of a clerk of the latter company that if the trunks were not delivered to the railroad company they would be brought back to the steamboat company's office, and that he knew of no such return during the month when the trunks were lost, is not sufficient to show a delivery to the railroad company exempting the steamboat company from liability.

FATHER MAY MAINTAIN ACTION AGAINST COMMON CARRIER FOR LOSS OF TRUNK containing his daughter's clothes. As he is bound to provide for her, the loss is not so much hers as it is his.

FATHER WHO TRANSPORTS BAGGAGE OF DAUGHTER AND RECEIVES CHECKS THEREFOR MAY MAINTAIN action against the common carrier for its loss, upon the contract, independent of his right as father. The contract for the transportation was made with him, and as holder of the checks, which take the place of a bill of lading, he may sue as consignee.

THE opinion states the facts.

Schley, for the appellant.

Steele, for the appellee.

By Court, COCHRAN, J. The appellee brought this suit to recover the value of a trunk and contents, lost while being transported from Baltimore to Wilmington, North Carolina.

The evidence shows that the appellant was proprietor of the Bay line of steamboats running between Baltimore and Portsmouth, Virginia; that in March, 1857, the appellee, with his daughter and servant, as passengers on through-tickets from New York to Wilmington, traveled on one of the appellant's boats from Baltimore to Portsmouth, and thence by the Seaboard and Roanoke railroad, and the Wilmington railroad to Wilmington; that his baggage was delivered on board of the boat at Baltimore, and checked for Wilmington, at which place he presented the check offered in evidence, and demanded the trunk for which it was given; that the trunk called for could not be found, and that it belonged to him, and contained wearing apparel prepared for his daughter, then nineteen years of age.

The exceptions of the defendant below present the only questions necessary to be considered in disposing of the appeals in this case, and they are: 1. Whether there was evidence of a delivery of the trunk to the Seaboard and Roanoke Railroad Company by the appellant, sufficient to go to the jury; and 2. Whether, upon the proof, the appellee can maintain this action for the value of the trunk and contents thus shown to have been lost.

The evidence relied on by the appellant, as tending to show that the trunk was delivered to the Seaboard and Roanoke Railroad Company, and for that reason was legally sufficient to go to the jury, was that of a clerk employed on one of the appellant's boats, who testified that "if a trunk is not delivered to the Seaboard and Roanoke Railroad Company at Portsmouth, it is always brought back to the office in Baltimore; that he knew of no such occurrence in March, 1857; that the baggage agents on board of the appellant's boats made lists of the through-baggage delivered by them to the Seaboard and Roanoke Railroad Company, and that these lists were not preserved." This testimony proves but little if anything more than the appellant's usual or customary course of dealing with baggage received for transportation, and in

that respect, no more than would be presumed of any one engaged in the business of a common carrier. The nature of that kind of undertaking not only requires but implies the adoption of some regular method or system in receiving, transporting, and preserving such property as the carrier receives in the way of his business; and in this case, without positive proof that the trunk was properly delivered by the appellant at Portsmouth, any presumption that could arise in the appellant's favor, from the evidence in question, would be repelled by one equally strong in favor of the carriers from that point to Wilmington. And besides, the loss of the trunk under the circumstances shown here was evidence, so far conclusive of negligence on the part of the appellant that it could not be rebutted, nor the appellant's liability for the loss discharged, by any general inferences drawn from its mode or system of business. To effect that result, it was necessary to show by positive proof that the undertaking to transport and deliver the trunk at Portsmouth had been fully and completely performed.

For these reasons, we hold that the testimony relied on as evidence that the trunk was delivered to the next carrier at Portsmouth was legally insufficient for that purpose, and we think there was no error in so instructing the jury.

The remaining question appears to us to be entirely free from difficulty. The fact that the lost clothing was prepared for the daughter of the appellee does not, in our opinion, divest him of the right to recover its value in this action. If we go further, even, than the evidence warrants us in doing, and concede that the exclusive right of using, and in that way the sole and exclusive right of consuming, the clothing contained in the lost trunk was vested in her, yet, looking to the appellee's legal obligation to provide for her, we should be constrained to hold that he had such an interest or property in the lost clothing as would enable him to maintain an action to recover its value. The loss complained of was not so much a loss to the daughter as to the father, who, by the nature of his obligation to her, was bound to make a new provision for her, and in that way bear the actual burden of the loss sustained. This point, so far as we have been able to discover, does not appear to have been considered or raised in any decided case, and in the absence of authority to the contrary, we adopt the conclusion stated as most consistent with the general doctrines pertaining to the rights of parties so related. The question does not,

however, depend on these considerations alone. The contract for the transportation was made with the appellee, the checks for the baggage, including that of the lost trunk, were delivered to him, and as holder of the checks, which took the place of a bill of lading, he was entitled as consignee, as well as upon the contract made with him, to demand a performance of the contract by the appellant, or upon its default to recover the damages resulting therefrom: *Brooke v. Pickwick*, 4 Bing. 218, 13 Eng. Com. L. 404; *Freeman v. Birch*, 1 Nev. & M. 420, 28 Eng. Com. L. 326; *Moore v. Wilson*, 1 Term Rep. 659; *Griffith v. Ingledew*, 6 Serg. & R. 429 [9 Am. Dec. 444]; *Camden & A. R. R. Co. v. Burke*, 13 Wend. 611 [28 Am. Dec. 488].

We think the rulings to which these exceptions were taken were correct. The questions raised upon the cross-appeal of the plaintiff below are important, but it will not be necessary to consider them, as the judgment must be affirmed upon our review of the exceptions of the defendant.

Judgment affirmed.

CARRIER WHO RECEIVES GOODS UPON UNDERTAKING TO DELIVER THEM TO ANOTHER CARRIER for further transportation continues liable as carrier until they are received by such second carrier, or until he in some way distinctly renounces responsibility, as by depositing them in a warehouse: *Goold v. Chapin*, 75 Am. Dec. 398, and note. This entire subject is exhaustively discussed in the note to *Wells v. Thomas*, 72 Id. 230.

BAGGAGE CHECKS ARE EVIDENCE OF DELIVERY OF BAGGAGE TO CARRIER: *Illinois Cent. R. R. Co. v. Copeland*, 76 Am. Dec. 749; *Davis v. Michigan Southern R. R.*, 74 Id. 151; *Dill v. South Carolina R. R. Co.*, 62 Id. 407.

McCREERY v. SUTHERLAND.

[23 MARYLAND, 471.]

INJUNCTION TO PREVENT SALE UNDER EXECUTION. — Where it appears that property which belongs *bona fide* to complainant is about to be sold under execution as the property of third persons, and where the bill alleges that this property constitutes his stock in trade and merchandise, that the consequences of permitting it to be seized and sold would utterly destroy his trade, credit, and business as a merchant, and deprive him of the means of support, an injunction will issue, as this case presents elements of apprehended damage and injury which could not be redressed at law.

THE opinion presents the facts.

McLaughlin, for the appellant.

Alexander and Wallis, for the appellee.

BOWIE, C. J. (dissenting). We cannot affirm the order granting the injunction in this case without departing from the best established principles and precedents. Mere trespass is not a ground for the interposition of a court of equity, even in cases of real estate; much less where the subject-matter is personal property of no peculiar character or value: 2 Story's Eq. Jur., sec. 928; *Amelung v. Seekamp*, 9 Gill & J. 468; *Hamilton v. Ely*, 4 Gill, 37, 38; *Shipley v. Ritter*, 7 Md. 413 [61 Am. Dec. 371].

The language of this court, in *Lewis v. Levy*, 16 Md. 90, is literally applicable to the bill before us. The learned judge who delivered the opinion of the court in that case thus expressed himself: "There is nothing here which distinguishes the case from many others in which it has been held an injunction will not lie. The complainant claiming goods in a store, on which the appellants levied an execution against a third party, under whom the complainant asserts title, seeks the restraining process of equity to prevent their being sold under that writ. The bill does not show that the property was of such a character or possessed such peculiar value or interest to the owner that he could not be adequately compensated by damages at law. If this injunction can be maintained, we can scarcely imagine a case where the execution of a judgment at law could not be prevented, and plaintiffs altogether frustrated in the recovery of just demands, even when asserted in the most solemn form."

In the case before us the complainant shows nothing which gives peculiar value to the stock of goods which he charges has been illegally seized at the instance of the defendants. The injuries which he alleges will ensue if they are removed are "insolvency," "prospects irretrievably blasted for life," and "credit ruined beyond hope." These consequences, though much to be deplored if realized, are not the necessary consequences of the seizure and sale of such property; in contemplation of law, the injury resulting from the seizure and sale may be measured and compensated by adequate damages.

In *Beall v. Brown*, 7 Md. 393, non-residence of a plaintiff, against whom the defendant had a cross-action at law, upon a warranty growing out of the same transaction, was held not sufficient of itself to give a court of equity jurisdiction to restrain by injunction the execution of the plaintiff's judgment. A large proportion of the cases in which the courts of equity have interposed to prevent irreparable injury are those of real

estate, and then only where the character and nature of the injury is clearly shown to be such as pecuniary compensation could not repair. Mere apprehension of injury is not sufficient.

From the mercantile character of personal property, its universal and intimate connection with all the operations of trade, if every injury which involves its value is to be prevented by injunction, upon the allegation of irreparable injury to the possessor, the traffic and commerce of the country would be seriously obstructed. All executions in which the right of property was doubtful would be drawn into chancery. Questions of right between man and man would be withdrawn from the tribunals of law, trials by jury and *viva voce* examination of witnesses would be superseded by the more dilatory and circuitous examination upon interrogatories, and decrees rendered upon evidence upon paper by judges ignorant of the moral weight of the testimony.

The appellee insists the injunction is not asked simply to stay the levy of an execution on goods which the plaintiff to the execution claims to belong to his debtors, on the allegation that these goods really belong to the complainant, but it is likewise averred those goods have a peculiar value, as forming a stock in trade, and that the sale thereof will have the further effect of destroying the trade of the complainant, and thus inflict irreparable damage; and it is submitted that where such damage is impending equity will interfere as freely for the protection of personal estate as of real estate.

In all the elementary writers, and most of the adjudged cases, as before intimated, where injunctions for the protection of personal property against seizure and sale are treated of, it is laid down as an essential prerequisite to the injunction to show the subject-matter of the trespass had some special and peculiar value, which could not be represented and secured by money. Lord Eldon, in the case of *Lady Arundell v. Phipps*, after alluding to the character of the trust under which the complainant claimed, said: "Another ground upon which Lady Arundell is entitled to relief here is, that from the very nature of the property in question, the quality and nature of the property alleged to be purchased, the purpose and object of the purchase, it is quite impossible for her to have the benefit of it, if a *bona fide* transaction, unless she can specifically enjoy it; and this court having in many instances interposed to protect the enjoyment of a specific chattel, the question is,

whether the very object and subject of the contract do not make it necessary to consider whether the court cannot give the specific relief of fixing in the trustees the very property, instead of the amount in damages": 10 Ves. 147.

This court, in *Bridges v. McKenna*, 14 Md. 268, after establishing the right of the complainant as a *feme covert* to invoke the extraordinary interposition of a court of equity for the protection of her separate personal estate, acquired under the act of 1842, by way of caution remarks: "In deciding that the complainant is entitled to the relief prayed by her bill, we do not mean in any manner to impugn the doctrines so ably announced in the cases of *Bowyer v. Creigh*, 3 Rand. 25, and *Allen v. Freeland*, 3 Id. 170, and which have been repeatedly recognized by this court." Again, in *Freeland v. Reynolds*, 16 Md. 416, decided by this court in 1860, which was an application for an injunction to stay the sale of certain goods seized by a sheriff under an execution against third persons, the court refused the injunction, relying upon *Lewis v. Levy*, 16 Id. 85; *Bridges v. McKenna*, 14 Id. 258; *Bowyer v. Creigh*, 3 Rand. 25; and *Allen v. Freeland*, 3 Id. 170.

The first of the cases in Randolph, *Bowyer v. Creigh*, *supra*, contains an epitome of the principles of equity, in the exercise of jurisdiction by injunction, admirably condensed, and exposes the evils ensuing from too facile an interference with executions, where the complainant has an adequate remedy in damages at law. The learned judge declares: "This interference of equity has grown to be a crying evil among us, and ought to be corrected with a firm and steady hand." After reviewing the authorities, he concludes: "As I understand it, they authorized the interference of equity in no case where the plaintiff claims as an encumbrancer merely; and when he claims as owner, only in those cases where, from the peculiar nature of the property and circumstances of the case, the remedy at law is incomplete": 3 Rand. 31, 32.

In the second of the cases referred to, *Allen v. Freeland*, 3 Rand. 170, it was held that slaves taken under execution and claimed by a third person could not be protected from sale by injunction, unless it was shown that they possessed some peculiar value which could not be compensated in damages. These conclusions are virtually incorporated into our own decisions by frequent adoption and approval in the cases before cited. If merchandise in a store can be invested with such peculiar character as would exempt it from seizure and

sale because it had been in the possession of the complainant, and he had thus acquired credit and established a custom, every man in trade would be entitled upon the same ground to an injunction who would swear that putting in an execution would work irreparable mischief to him. The standard is not mischief to the man so much as loss of the thing which cannot be restored by money. Thus the "silver altar," and the "ancient horn," and the "family portraits" were objects which money could not replace. But a stock of merchandise in a store or the good-will acquired by twelve months' trade do not come within the category of things which should be protected by injunction because the party injured is without adequate and complete remedy at law.

The general rule laid down by Story, that a court of equity will interpose to prevent irreparable injury from loss of trade, is not supported by reference to any case similar to the present, but such as fraudulent simulation of articles of manufacture, or assumption of a style or firm already established. The industry and experience of the appellees' counsel have not enabled them to produce a parallel case: *Hyde v. Ellery*, 18 Md. 500, 501. The last reported case in this court in which an injunction to stay the sale of goods was sustained was based upon a charge of combination and fraud on the part of the defendants, on which ground this court mainly relied.

By Court, BARTOL, J. A majority of the court agree with the chief justice in most of the views expressed in his opinion in this case. But an examination of the previous adjudications by this court to which he has referred, and a consideration of the general principles upon which the jurisdiction of courts of equity in such cases depends, have brought us to the conclusion that upon the allegations in the bill before us the injunction was properly issued. Such applications are always addressed to the sound discretion of the court, and every case must depend upon the particular facts and circumstances belonging to it, and alleged on the face of the bill.

The case of *Bridges v. McKenna*, 14 Md. 258, rested upon the well-established jurisdiction of courts of chancery over the separate property of *femes covert*, and did not involve any decision of the question upon the jurisdiction of the court or upon the right of the complainant to maintain the bill for injunction, if she had been *svi juris*. The cases of *Lewis v.*

Levy, 16 Md. 85, and *Freeland v. Reynolds*, 16 Id. 417, were both of them instituted by parties claiming title as grantees under bills of sale or mortgages of personal chattels, not being in possession; and claiming the interference of the court by way of injunction to protect the same from seizure and sale under execution. This court held that the injunction ought not to be issued; and the grounds and reasons upon which those cases rest are too firmly established now to be shaken.

But, in our opinion, the case now before us is clearly distinguishable from those. Here the bill of complaint alleges that the property which the appellant is about to seize and sell under his execution against Worth and Fullerton belongs *bona fide* to the complainant, and constitutes his stock in trade and merchandise; and that the consequence of permitting them to be seized and sold would utterly destroy his trade, credit, and business as a merchant, and deprive him of the means of support.

It is said that the injunction ought to be refused because the complainant has full and complete remedy at law. If this were so, we agree that a court of equity would have no jurisdiction to grant relief in the case. But to our mind it appears that there are elements of apprehended damage and injury alleged in this bill not presented in the cases of *Lewis v. Levy* and *Freeland v. Reynolds*, *supra*, and for which the law does not afford adequate and sufficient remedy, either by action of trespass or by replevin. This last remedy would be utterly inadequate, and would require such a multiplicity of suits as would leave the injured party without remedy.

In our opinion, the recent case of *Hyde v. Ellery*, 18 Md. 496, in which this court sustained the injunction, was more analogous to the present. There the injunction was granted as ancillary to the general relief prayed. But the question before us was upon the right of the complainant to the injunction; and we think the principles upon which that case was determined ought to govern this; and being of opinion that there was no error in granting this injunction, the order appealed from will be affirmed and the cause remanded.

Order affirmed and cause remanded.

INJUNCTION AGAINST EXECUTION SALE: See *Howard v. Cannon*, 75 Am. Dec. 736; *Carlin v. Hudson*, 62 Id. 521; *Holland v. Mayor of Baltimore*, 60 Id. 195; *Pollock v. Gilbert*, 60 Id. 732.

HARDESTY v. TAFT.

[28 MARYLAND, 512.]

REQUIREMENT OF CONSTITUTION THAT ACTS OF LEGISLATURE BE IN ARTICLES AND SECTIONS, IN SAME MANNER AS CODE is arranged, is directory in form, and looks more to convenience in adopting the law to codification than to its operative effect.

INJUNCTION TO PREVENT USE OF REGISTER OF VOTERS — POWER OF COURT. —

Where constitution provides that after the general assembly shall have passed an act of registration, and the same shall have been carried into effect, no person shall vote whose name does not appear on the register, and an act of the legislature provides that the judges of election shall not receive or deposit the ballot of any persons whose name does not appear thereon after such a law has been passed and has gone into effect, a petition for an injunction preventing the use of a register prepared for a certain county, and that the election be conducted as before the passage of the registration law, upon the ground that the officers of registration were not duly qualified, will not be granted, as, under the constitution, the court has no power to change the evidence of a voter's qualifications in one section of the state, and clothe the judges of election therein with powers not conferred by the legislature, but expressly taken away.

REGISTRATION LAW MAY BE SAID TO HAVE BEEN CARRIED INTO EFFECT when the registrars have been appointed for every county in the state, and have entered upon and are discharging their duties.

LAW TO CARRY ON GOVERNMENT ARE TO RECEIVE LIBERAL CONSTRUCTION TO EFFECTUATE OBJECTS DESIGNED, and if the legislative purpose can be arrived at in the absence of express language, that meaning is to be observed and obeyed.

REGISTRATION OFFICERS ARE PROPERLY QUALIFIED BY TAKING AND SUBSCRIBING OATH IN REGISTRATION BOOK before any one having authority to administer oaths. It is not necessary that they should take the oath before the clerk of the circuit court, and subscribe thereto in his test book.

EQUITY JURISDICTION — REMEDY AT LAW. —Where registration law provides for days for the correction of errors and supplying omissions in register of voters, if the registration officers misconceive their duty in any respect, or violate their trust by asking questions of applicants for registration which the law does not warrant, it is not for a court of equity to apply the remedy by injunction, and arrest their proceedings because one or more may not have been fairly dealt with. Nor will the joinder of several of the latter give equity jurisdiction, upon the ground of preventing a multiplicity of suits.

OFFICER MUST SHOW THAT HE IS OFFICER DE JURE, AND NOT DE FACTO, TO DEFEND HIMSELF against an action brought against him by one who has been injured by his official acts. As to third persons, however it is sufficient to show that he is an officer *de facto*.

BILL ASKING THAT ACTS OF OFFICER BE DECLARED INVALID BECAUSE AT TIME OF THEIR PERFORMANCE OFFICER HELD ANOTHER OFFICE of profit under the government, in violation of the constitution, must be supported distinctly by the proofs exhibited with the bill. The bill should show, also, that at the time of the performance of the acts claimed to be invalid, the officer was also in office under the other appointment.

WHERE OFFICER IS CHARGED WITH HAVING HELD TWO OFFICES OF PROFIT UNDER GOVERNMENT AT SAME TIME, in the absence of a specific allegation to the contrary, a presumption might fairly be indulged in favor of the continuance of government, that, if the offices were in conflict, the resignation of the one alleged to be the constitutional barrier to the other had previously taken place.

COURT OF EQUITY HAS NO JURISDICTION TO PREVENT PERFORMANCE OF POLITICAL DUTIES like those committed to officers of registration.

WILLFUL, FRAUDULENT, OR CORRUPT REFUSAL OF VOTE BY JUDGES OF ELECTION, OR LIKE DENIAL OF REGISTRATION by the officers appointed to register voters, can be adequately compensated for in damages at law, and equity will consequently refuse to interfere in such matters.

THE opinion states the case.

Pratt and Clarke, for the appellant.

Randall, attorney-general, for the appellees.

By Court, WEISEL, J. The peculiar character of the bill in this case may be learned from the prayer with which it concludes. In the language of the appellants' brief, "the bill prays for the writ of injunction against the officers of registration for Prince George's County, enjoining and strictly prohibiting them from returning copies of their books or lists of qualified and registered voters to the clerk of the circuit court for said county, and the judges of election of the several election districts, and the writ of injunction against Frederick Sasscer, clerk of the circuit court for Prince George's County, enjoining and strictly prohibiting him from receiving a copy of the said books or lists of legal and qualified voters, and the writ of injunction against the judges of election for the said county, enjoining and strictly prohibiting them from receiving a copy of the said books or lists of qualified voters, and from regarding the said lists of legal and qualified voters in determining who are legal and qualified voters, entitled to vote at the coming election, and that they may be directed and commanded to conduct the said election on the 7th of November, 1865, according to the constitution and laws in force prior to the passage of the act of 1865, chapter 174, and as if the said law had not been passed, or the said lists of legal and qualified voters made out by the said officers of registration."

Without stopping at this point to inquire whether equity will lend its aid to accomplish the objects sought by this bill, we state that this court has already passed upon the validity of the law of 1865, chapter 174, for the registration of voters, so far as it and the fourth section of the first article of the con-

stitution were charged to be in conflict with the tenth section of the first article of the constitution of the United States, or with the bill of rights of Maryland. The views of the court upon this branch of the inquiry have been expressed in the opinion filed in the case of *Anderson v. Baker*, 23 Md. 531, and they need not be here repeated.

The law is assailed, however, in this proceeding, as void under the twenty-eighth section of the third article of the constitution of Maryland, which makes it the duty of the general assembly to enact public general laws in articles and sections, in the same manner as the code is arranged; and it is alleged that this requirement is vital, and was disregarded by the legislature in the passage of this law.

The first clause of this section provides for those properties of a general statute law of Maryland, which may be regarded as necessary to its validity. It gives the style of the law; the law must be passed by original bill; it must embrace but one subject, and that shall be described in the title; and no law or section of law shall be revived or amended by title or section only. These are regarded as requisites in the structure of such a law, necessary to its being; and yet only to a reasonable intent; for notwithstanding the mandatory nature of the language used, this court has, in various instances, given to the like provision in the constitution of 1851 (art. 3, sec. 17) a liberal construction, to effectuate, and not to destroy, the legislative will. A reference merely to these cases is deemed sufficient, viz.: *Davis v. State*, 7 Md. 159, 160 [61 Am. Dec. 331]; *Keller v. State*, 11 Id. 531, 532 [69 Am. Dec. 229]; *Parkinson v. State*, 14 Id. 193, 194 [74 Am. Dec. 522].

The residue of the section relates to another and less important matter in the framework of the law, looking more to convenience in adapting it to codification than to its operative effect; and the language assumes the directory form. The laws having been codified under former enactments, the constitution contemplates the continuance of the system, and to save time, labor, and expense, the duty is imposed upon the legislature, in amending existing laws, or enacting public general laws, to observe certain forms, to adapt them to the code arrangement. Regarding a compliance with this provision as not essential to the validity of a public general law, yet, viewing this act of assembly in connection with chapter 159 of the same session, we think that the directions of the constitution in this respect have been substantially and sufficiently com-

plied with. That enacts that a new article shall be added to the code, entitled "registration," under which shall be arranged, by titles and sections, as in other articles of the code, this registration law, and the other laws to be passed by the general assembly, on the subjects of the registry of births, marriages, and deaths, and such other subjects of registration as the legislature may enact and direct. This appears to us to be a sufficient compliance with the directions of the constitution. A new article, under the name of "registration," is enacted, and the titles or subjects in it are declared in their order,—births, marriages, deaths, and voters; and the law under consideration was passed in sections. All that is essential for its easy arrangement in the code is thus provided for. Until this codification shall have been ordered by the legislature, the law, in its present form, will occupy its place in the published volume for the year, like other laws of the same session, and will be as readily found and understood as if it had been passed with the other laws referred to in chapter 159, in one law, with chapter, titles, and sections, etc., as above directed. We do not, therefore, consider the law as affected by the objection which has been urged against its validity on this ground.

The law, then, being operative, the other causes of complaint are matters pertaining to its execution.

It is said the officers of registration in Prince George's County were not qualified as the law directs; and therefore their acts are void, and the court should remit the election to the judges of election. The constitution provides that after the general assembly shall have passed an act of registration, and the same shall have been carried into effect, no person shall vote unless his name appears on the register, and the registration shall be evidence of the qualification of the voter: Art. 1, sec. 2. And the law itself declares that the judges of election shall not receive or deposit the ballot of any person until they have found his name on the list or register of qualified voters, and have checked it thereon: Sec. 18. If it is a valid general law, and if registrars have been appointed for every county of the state and city of Baltimore, and have entered upon and are discharging their duties, the law is carried into effect; and no court has the power, and such could not be the effect of any order or decree it might pass, to change the evidence of the voter's qualification in one section or county of the state, and clothe the judges of election therein with powers

not conferred by the legislature, but expressly taken away. Whatever may be the effect in a county or election district of a registration of voters by officers not qualified as the law directs, it is certainly not the province of this court to order, by injunction, an election therein in a manner different from that designed by the law.

But we think there is no defect in the qualification of the officers of registration, by taking the required oath of office before a justice of the peace, instead of the clerk of the circuit court for the county. Laws to carry on the government are to receive a liberal construction to effectuate the objects designed; and if the legislative purpose can be arrived at, in the absence of express language, that meaning is to be observed and obeyed. At all events, it would not be a safe or wise rule to substitute another intent, equally if not more doubtful, in order not to support the act of a public agent, but to annul it. One law of the state (1 Code, art. 68, secs. 6, 7) provides that all officers (other than those mentioned in the preceding sections) elected or appointed to any office of trust or profit under the constitution and laws of the state, including mayors, etc., shall take and subscribe the said oath (if in a county) before the clerk of the circuit court of the county, or before one of his sworn deputies; and the clerk shall procure and keep in his office a well-bound book, to be called the test book, in which the oath shall be printed or written conspicuously, and the person taking or subscribing the same shall annex to his signature the title of the office to which he shall have been appointed or elected, and the date of his signature. Now, the question is, Were the officers of registration to take the oath of office before the clerk? If so, they were to subscribe it in the clerk's test book. Yet the registration act (sec. 1) requires them to take the oath and subscribe the same in the book of registration for their respective wards or election districts, without expressly specifying before what officer. These officers were appointed for each ward and election district. Their duties were to be performed in such ward or district, and not beyond it. The registration books were to be furnished them in each ward of the city of Baltimore, and election district of each county: Sec. 4. These books were to continue in their possession not later than the day of election, and then to be deposited with the clerk of the circuit court for safe-keeping. Their appointments were temporary, and their duties specific,—the same with or analogous to those of judges

of election. Convenience therefore dictated that they should qualify in the district or ward where their duties were to be performed, and where the books of registration, in which the law directed them to subscribe the oath, were to be kept during the performance of said duties. The law does not provide that the oath should be duplicated, which would be the case if taken before the clerk of courts. This view alone, without enlarging upon the subject, or supporting it by analogous cases, is sufficient to satisfy the court that the registrars were properly qualified by taking and subscribing the oath in the registration books before any one having authority to administer oaths.

If the registrars have, in the execution of the law, misconceived their duty in any respect, or violated their trust by propounding to applicants for registration any questions which a due examination into their qualification did not warrant, it is not for a court of equity to apply the remedy by injunction, and arrest their proceedings, because one or more may not have been fairly dealt with. Besides, if their names were recorded, and they took the oaths required (as is alleged in the bill), days were allotted by the law for the correction of errors and supplying omissions, and the complainants had the time and opportunity to resort to the registrars, and claim from them a final disposition of their cases. Without availing themselves of the mode thus afforded them by law, or waiting for the appointed time, they filed a bill for the injunction prayed for in this case. A court of equity could not, under such circumstances, entertain the application.

It is averred that some of the officers of registration, whilst acting as such, held other offices of profit under the constitution or laws of the state, and that they were therefore precluded from exercising the functions of officers of registration by the thirty-fifth article of the declaration of rights, which declares "that no person ought to hold at the same time more than one office of profit, created by the constitution or laws of this state." The cases cited in support of this position were suits at law against officers irregularly or improperly appointed or qualified or having no jurisdiction, for damages for acts done by them in the discharge of official duties, and they relied upon their office in justification of their proceedings; and the courts held that this may be a good defense so far as third persons were concerned, but to justify proceedings in a case brought by the person injured against an officer, the defendant must

show that he was an officer *de jure*, and not simply *de facto*. But this is an application to a court of equity to stop the proceedings of a class of officers in the county charged with the registering of its voters because a few of the officers in certain districts were not proper subjects of appointment. To yield to such an application would manifestly be stretching the sound discretion of the court beyond all limits. And even if the application were to arrest the particular proceedings of the persons alleged to be illegally exercising the functions of the office, the averments of the bill, resting upon proofs exhibited with them, should be distinctly supported by such proofs. In this case the exhibits, while they show other appointments and qualifications thereunder at other and anterior times, do not show or satisfy the court that at the time of exercising their functions as officers of registration they were also in office under their other appointments. A presumption might fairly be raised in support of the continuance of government, that, if the officers were in conflict, a resignation of the one alleged to be the constitutional barrier to the other had previously taken place. Nor do we design to be understood in what has fallen from us on this point of objection as expressing an opinion upon the nature or effect of the official acts of a person holding two offices of profit at the same time under the constitution or laws. The case as presented to us in the bill before us does not raise this inquiry.

We have thus disposed of all the causes or grounds relied upon in the bill for the exercise of the preventive remedy by injunction, treating the application as one that might be addressed to the sound discretion of a court of equity. .

On this branch of the inquiry it seems to the court very clear that a court of equity cannot be invoked to prevent the performance of political duties like those committed to the officers of registration under the law. The willful, fraudulent, or corrupt refusal of a vote by judges of election, or a like denial of registration by the officers appointed to register votes (which is the same thing), can be adequately compensated for in damages at law: *Bevard v. Hoffman*, 18 Md. 484. The writ of injunction will not be awarded in doubtful or new cases not coming within well-established principles of equity: *Bonaparte v. Camden and Amboy R. R. Co.*, 1 Bald. 218. Each voter has a separate and distinct remedy for the willfully improper deprivation of his vote; and the joinder of others like circumstanced or injured as complainants in equity, on the

ground of avoiding a multiplicity of suits, will not avail to afford equitable relief. To interfere in the mode asked for by the complainants would be to stop a popular election in one portion of the state, and thus arrest, as to it, the wheels of government. For irregularities in the conduct of an election, for receiving illegal or rejecting legal votes, and for the correction of consequences resulting therefrom, the law provides appropriate remedies and modes of procedure. Such matters are not the subjects of equitable jurisdiction.

Order refused and bill dismissed, with costs to the defendants.

WHERE STATUTE PROVIDES REMEDY, equity will not assume jurisdiction except in exceptional cases: *Osborne v. Ordinary*, 63 Am. Dec. 230. Where a party has an adequate remedy at law, equity will not entertain jurisdiction: *Lexington Life etc. Co. v. Page*, 66 Id. 165; *O'Neal v. Virginia & M. B. Co.*, 79 Id. 669.

ACTS OF OFFICERS DE FACTO are, from public necessity, so far as third persons are concerned, of equal validity as those of officers *de jure*: *Farmers' etc. Bank v. Chester*, 44 Am. Dec. 318; *Burke v. Elliott*, 42 Id. 142; *State v. Williams*, 68 Id. 65; *Shelby v. Alcorn*, 72 Id. 169.

ALL PERSONS WHO ARE PROVED TO HAVE ACTED AS PUBLIC OFFICERS are presumed to have been duly appointed to office until the contrary appears: *Allen v. State*, 68 Am. Dec. 457, and note.

HENRY v. KAUFMAN.

[24 MARYLAND, 1.]

WHERE RECEIVER IS APPOINTED IN EQUITY, and sells the property of defendant, who, before final decree, and while the fund is still in the receiver's hands, becomes an insolvent petitioner, and has the receiver appointed his permanent trustee, the court of equity in which the fund is found at the moment of insolvency is not debarred from taking all steps necessary to its preservation.

RECEIVER CANNOT, BY BECOMING TRUSTEE of an insolvent, defy the authority of the court from which he received his appointment, and refuse to account for the funds committed to him as receiver.

ORDER OF COURT REQUIRING RECEIVER to bring the fund in his hands into the court from which he received his appointment as receiver does not conflict with the power of the insolvent court in appointing him the permanent trustee of the party whose property he had sold as receiver, but is ancillary to it. The fund being brought in and the amount ascertained, an order to pay over to the insolvent trustee would follow as matter of course.

WHEN FUND IN HANDS OF RECEIVER is in the custody of the court of equity which appointed him, his office as receiver is not *functus officio* until his liability as to the fund is determined, and his subsequent ap-

pointment by an insolvent court as permanent trustee for the party whose property he had sold as receiver does not release him from responsibility to the court of equity for the faithful discharge of his trust as receiver.

ORDINARILY, NO APPEAL WILL LIE from an order requiring a trustee or receiver to bring money into court; such orders rest in its discretion, and where they determine no right, are not the subject of review on appeal.

THE facts are stated in the opinion.

Alexander and Barroll, for the appellants.

Brown and Stewart, for the appellees.

By Court, BOWIE, C. J. The receiver in this case, as the agent of the court, sold the property in dispute, before final decree, to prevent waste and loss, the proceeds being subject to the claims of the parties thereafter to be adjudged. Subsequently, the defendant Henry became an insolvent petitioner, and Barroll, the receiver, was appointed his permanent trustee. The order of the court of equity requiring him, as receiver, to bring the fund into court is now appealed from by him, on the ground that the case abated by the insolvency of Henry, and after the appointment of a permanent trustee the fund passed *ipso facto* into the hands of Barroll, as trustee, and the jurisdiction of the court of equity ceased *eo instanti*.

In our opinion, the policy of the insolvent system does not debar the court in which the fund is found at the moment of insolvency from taking all steps necessary to its preservation. It would make the law an instrument of fraud, if a receiver, by becoming trustee of an insolvent, could defy the authority of the court from which he received his appointment, and refuse to account for the funds committed to him as receiver. The order requiring the money to be brought into court does not conflict with the power of the insolvent court, but is ancillary to it. Being brought in, and the amount ascertained, an order to pay over to the insolvent trustee would follow as a matter of course. Many of the cases cited show that the insolvent trustee asserted his claim to the fund by petition in the court of equity, to enjoin or prohibit the action of the trustee or officer of the latter court, to the prejudice of the former.

In the case of *Glenn v. Gill*, 2 Md. 1, the insolvent trustee filed his petition in the court of equity, in the cause in which

the receiver was appointed, praying an order directing him to pay over and deliver to the trustee all the money and effects in his hands as receiver, which was directed to be done. The trustee did not attempt to recover the proceeds at law, or appropriate them without the order of the court of equity. When, in the subsequent case of *Glenn v. Boston and Sandwich Glass Co.*, 7 Md. 294, 296, it was held that these funds were liable to attachment at the suit of a foreign creditor, although they had not actually come to the hands of the trustee at the time of the attachment laid, it was because the court of appeals had, in two previous cases, *Kerr v. Potter*, 6 Gill, 404, and *Glenn v. Gill*, 2 Md. 1, declared there was no ground for the appointment of a receiver, and the funds were improperly in his hands. Hence the possession of the receiver was held to be the possession of the trustee; such a petition not giving jurisdiction to the court of equity, but recognizing its authority to pass orders necessary for the transfer of the fund from one jurisdiction to another. If the court of equity has power to that extent, it must have the power to require the money to be brought in, otherwise their proper officer could not be discharged or fixed in his liability.

Suppose the receiver and trustee were different persons, and not one and the same, as in the present case. The former, as such, would not be authorized to pay over the funds to the latter without the order of the court by which he was appointed. If he refused, the court of equity only would have such summary control over him as could compel him to obey. Otherwise, the insolvent trustee must proceed by action at law on the receiver's bond, the breach of which could not be alleged without a previous order of the court of equity to pay over, and his refusal.

This fund was in the custody of the court of equity, by which the receiver was appointed; its aggregate was undetermined. The order appealed from reserves the question of the liability of the receiver for interest which had or might have accrued on the funds in his hands. Until this liability was determined, the receiver was not *functus officio*, and his appointment by the insolvent court did not release him from responsibility to the court of equity for the faithful discharge of his trust as receiver. We think, therefore, without disturbing any of the preceding decisions of this court, that the power of the court of equity in this instance is ancillary to the jurisdiction of the insolvent court, and invoked for the

protection of the fund which may be properly within the jurisdiction of the latter, for distribution.

The conclusion arrived at above makes it unnecessary to dispose of the motion to dismiss the appeal. It is well settled that ordinarily no appeal will lie from an order requiring a trustee or receiver to bring money into court; such orders rest in the discretion of the court, and where they determine no right are not the subject of review on appeal: *Wheeler v. Stone*, 4 Gill, 88; *Ellicott v. Warford*, 4 Md. 80. And without recognizing the right of appeal in such cases, we will affirm the order below, and remand the cause for such further proceedings as the case may require.

Order affirmed and cause remanded.

RECEIVERS—THEIR RIGHTS, DUTIES, AND RESPONSIBILITIES, and over what property will be appointed: Note to *Cortleyen v. Hathaway*, 64 Am. Dec. 482, and note to *Chautauque County Bank v. Risley*, 75 Id. 359.

THE PRINCIPAL CASE IS CITED and approved in High on Receivers, sec. 269, 278. It is also cited in Kerr on Receivers, Bispham's ed., p. 162, note.

BANKS v. McCLELLAN.

[24 MARYLAND, 62.]

ASSIGNEE OF EQUITY OF REDEMPTION in mortgage tainted with usury is entitled to the aid of equity to redeem by proffering to pay the mortgage debt and simple interest thereon, or by bringing the same into court to be paid to the mortgagee.

WHERE MORTGAGOR HAS ASSIGNED ALL HIS INTERESTS in the mortgaged property, he is a competent witness for the assignee to show the true amount due on the mortgage.

WHERE SUBJECT-MATTER OF MORTGAGE IS NOT UNMIXED CHOSEN IN ACTION for the payment of money, the assignee of the mortgagor may maintain a suit in equity in his own name for an accounting of the amount due on the mortgage, and to reduce the same on the ground of usury.

ASSIGNEE OF MORTGAGOR'S RIGHTS, although the latter has conveyed absolutely, if the transaction was intended merely as security for a loan, can resort to equity for a decree declaring the conveyance a mortgage, and directing the reconveyance of the property, upon payment of the amount properly due, or if the property has passed beyond the assignee's reach, and the mortgage is overpaid, the court may order an account and repayment of the difference. *Aliter*, when the conveyance is absolute and excludes all idea of a loan and security.

USURY.—MONEY DUE FOR INTEREST may, by agreement, be changed into principal to bear interest in future, but not otherwise. Interest cannot be calculated on interest for several years in arrears.

USURY.—PAYMENT OF CHARGES FOR TAXES on a mortgage by the mortgagor under an agreement to that effect, with simple interest on each item from the time it was paid, is not usurious.

ASSIGNEE OF MORTGAGOR STANDING IN LEGAL PRIVITY with the mortgagor may avoid the contract for an excess of usury, and is entitled to the proper reduction on the mortgage, to enable him to perform his contract, and by payment to relieve the mortgaged premises from the encumbrance, in favor of a purchaser from the mortgagor.

THE opinion contains the facts.

Steele and Miller, for the appellant.

Machen, for the appellee.

By Court, WEISEL, J. The complainant, *Eliza A. McClellan*, the appellee in this court, claims as assignee of her brother, *William W. McClellan*. The subject-matters of the assignment are:—

1. All the claim, interest, and benefit of the assignor in the sum of three thousand three hundred dollars in Baltimore City stock, deposited with Messrs. Brown and Brune, attorneys of Henry V. Ward, to whom the assignor sold certain real estate in Baltimore, on the corner of Baltimore and Charles streets, on which Banks, the appellant, held a mortgage, and claimed an amount, which was disputed; the said stock for three thousand three hundred dollars being withheld by Ward, the purchaser, to abide the determination of said dispute, and the assignee undertaking to satisfy the said claim of the mortgage as it may be legally or equitably determined.

2. All the claim of the assignor against said Banks for or on account of the value of a yearly rent of one hundred dollars, conveyed by him and wife to said Banks by deed of the 28th of May, 1841, and all the agreements between them concerning said rent, and relating to the claim or right of the grantors to have the same reconveyed to him, the said McClellan, upon his paying a certain sum for so much in value lent to him by Banks, for which said conveyance was meant only as a security. This property is on Bank Lane in said city, and particularly described in the deed of said McClellan and wife to said Banks exhibited with the bill, and marked Exhibit E, No. 2.

3. All the right, title, claim, interest, and estate, legal and equitable, of the assignor in and to, and all his right under an agreement with said Banks for a reconveyance and release of the rent and reversion of a piece of ground in said city, on Baltimore Street, near Green Street, leased by said Banks to John T. Purcell, and to and in the rent reserved on said lease,

and the reversion of and in the ground;—the said assignee (the complainant) to satisfy said Banks the debt due to him for which said property was originally mortgaged by Catharine McClellan.

The consideration of this assignment, besides the undertakings by said Eliza to pay said mortgage claims, was a conveyance by her to said William of certain leasehold property in the city of Baltimore, executed a short time before said assignment to her, viz., on the 9th of June, 1859, and the said assignment was made without any recourse whatever to said William W. McClellan, his heirs, executors, or administrators.

The record contains written evidence that the property out of which the lease to Purcell was carved, and also the reversion in the portion covered by that lease (which is the third subject-matter of the assignment), were to be reconveyed to William W. McClellan, upon payment of the money and interest thereon, to secure which said property was originally mortgaged by Catharine M. McClellan. The appellee, as assignee of the equity of redemption, is entitled to the aid of a court of chancery to redeem said property by paying the mortgage debt and simple interest thereon, or by bringing the same into court to be paid to the said Banks. This she proffers in the bill to do, and prays for its reconveyance to her.

In order to extricate the three thousand three hundred dollar city stock held on deposit by Messrs. Brown and Brune to indemnify Ward, the appellee undertakes by the bill to litigate with Banks touching the amount due him on his mortgage on the property at the corner of Baltimore and Charles streets. As by the terms of the assignment to her, and as part of its consideration, she engaged to pay whatever might be found due on that mortgage, we think she can maintain her position in a court of equity for this purpose. That claim is a lien upon the city stock assigned to her, and its true amount was a matter of controversy. She alleges that the consideration of the mortgage was usurious, and that the sum claimed by Banks should be purged of the usury and thereby largely reduced, as well as by deductions for certain charges for taxes, for which the mortgagor was not bound. To reduce it still further she claims an account touching the transaction which forms the second subject-matter of the assignment to her, the conveyance of the property on Bank Lane, which, it is alleged in the bill, was intended as a mortgage between her brother and Banks, but which the latter, in fraud of his agreement,

insisted on treating as an absolute conveyance, and afterwards sold and conveyed the property to a third party.

The consideration of these questions involves the exceptions by the defendant below to the competency of William W. McClellan as a witness, and the admissibility of his proof; and also the objection urged in the argument to the ability of the complainant to maintain this suit in her own name as assignee of these subjects of contest.

We regard William W. McClellan as divested of all interest in the subjects in controversy by the assignment to his sister and its terms, and therefore competent to be a witness for her, on the authority of *Crawford v. Brooke*, 4 Gill, 217; *Pegg v. Warford*, 7 Md. 603; *Reynolds v. Manning*, 15 Id. 518, 522; *Nat. Fire Ins. Co. v. Crane*, 16 Id. 294 [77 Am. Dec. 289].

We also regard these matters of the assignment as not unmixed choses in action for the payment of money, and therefore as not embraced within the terms of the act of 1829, chapter 51: See *Gordon v. Downey*, 1 Gill, 41; *Crawford v. Brooke*, 4 Id. 221, 222.

As assignee of the mortgagor's rights, in reference to the ground-rent and reversion in fee in the property on Bank Lane, if the transaction in relation to it between her brother and Banks was intended merely as a security for a loan, the appellee can resort to a court of equity for a decree declaring the conveyance a mortgage, and directing the reconveyance of the property upon payment of the amount properly due, or if the property has passed beyond her reach, and the mortgage be overpaid, ordering an account and repayment of the difference.

Much of the controversy in this case relates to this transaction, which originated in 1841, more than eighteen years before the filing of the bill. Mr. McClellan is sufficiently distinct in stating that it was understood and agreed between himself and Banks that the gas company stock received by the former was but a loan, and not a purchase, and the conveyance of the ground-rent to the latter, absolute on its face, was to be regarded only as a security, and the only corroborating circumstance stated by the witness is, that at the end of three years Banks, being applied to, consented that the loan might continue. But to the mind of the court all the other circumstances militate against the idea of a loan and security. The length of time (which may be regarded among the probabilities to be taken into consideration with the proof, although by

agreement it was not be relied upon as a defense); the various subsequent accounts between the parties, when no reference was made to any claim on this account; the fact that the property was the estate of Mrs. McClellan, who joined her husband in the conveyance, and to whom, and not her husband, the reconveyance, if agreed upon, should have been stipulated to be made; and that no notice whatever was taken of this claim by McClellan in 1858, when he tendered to Banks the sum of two thousand three hundred dollars in full satisfaction, and demanded a reconveyance of the Purcell property and a release of the mortgage of the 6th of May, 1850, without any demand for a reconveyance of the Bank Lane property, or any repayments on that account,—are sufficient to satisfy the court that whatever may have been the understandings originally between the parties, McClellan acquiesced in the absolute nature of the transaction, and waived all further claims to this property. We therefore think that the appellee is not entitled to an account of and concerning the matter and moneys alleged in reference to this branch of the assignment to her, and that the conveyance to Banks by William W. McClellan and wife of the 28th of May, 1841, being Exhibit E, No. 2, with the bill of complaint, should be held and treated, as it is upon its face, an absolute deed of conveyance.

It is proved that the consideration of the mortgage of May 6, 1850, for \$1,288.60, was usurious. Money due for interest may, by agreement, be changed into principal to bear interest in future, but not otherwise. In this case, interest was not only calculated on interest for several years in arrear, but the amount so added was doubled. We consider that the charges for taxes on the mortgage, with simple interest on each item from the time it was paid, are allowable, Mr. McClellan having agreed to pay them, and the law authorizing such payments without incurring usury. The statement of Exhibit E, No. 7, by striking out the item of \$6.45, second charge, being interest on interest, and adding in lieu of it interest at the rate of six per cent on one thousand dollars from the 8th of January, 1850, to the 6th of May, 1850, and also adding the tax items in Exhibit E, No. 6, with legal interest on each from the time when they were respectively paid to May 6, 1850, would present the proper sum as the consideration of that mortgage; and that sum, with six per cent interest on it from the date of said mortgage, May 6, 1850, to the present time, would show the amount due upon it.

The assignee, standing in legal privity with William W. McClellan, can avoid the contract for the excess of usury (*Dix v. Van Wyck*, 2 Hill, 522), and is entitled to the proper reduction on this mortgage, that the true lien on the three thousand three hundred dollars city stock assigned to her may be thus ascertained and determined, to enable her to perform her part of the contract with her brother in this respect, and by her payment of which to relieve the mortgaged premises from the encumbrance in favor of Ward, the purchaser.

It follows from these views that the exceptions to all the audits should have been sustained; and that the amount on both outstanding mortgages, which the assignee undertook to discharge, should be ascertained by the auditor conformably to this opinion, and that the decree should direct a reconveyance of the one to the appellee, and the release of the other to Ward, upon her paying the amounts, or bringing the same into court, to be paid to the appellant; and we are further of opinion that each party should pay his respective costs in both courts.

The decree below will be reversed, and the cause remanded, with instructions for an audit, or audits, and a decree conformably to the views expressed in this opinion.

Decree reversed and cause remanded, each party to pay his own costs in both courts.

USURY, WHEN MAY BE SET UP as defense in action on a usurious mortgage: *Stephens v. Murr*, 65 Am. Dec. 764, and note 767; *Ladd v. Wiggins*, 69 Id. 551.

AFTER INTEREST BECOMES DUE, it may, by agreement, be turned into the principal, and bear interest: *Hale v. Hale*, 78 Am. Dec. 490, and note 494; *Belava v. Lepretre*, 56 Id. 266.

MORTGAGOR MAY MAINTAIN BILL IN EQUITY, if filed within a reasonable time, for relief against usury: *Scott v. Leary*, 34 Md. 399, citing the principal case.

ASSIGNEE OF EQUITY OF REDEMPTION, being in legal privity with the mortgagor, has the right to redeem upon payment of the mortgage and simple interest: *Andrews v. Poe*, 30 Md. 499, citing the principal case.

STATE v. BALTIMORE AND OHIO R. R. Co.; AND
BALTIMORE AND OHIO R. R. Co. v. STATE.

[24 MARYLAND, 84.]

CARRIERS OF PASSENGERS ARE BOUND TO EXERCISE towards such passengers the utmost care and diligence which human foresight can use.

WHERE PARTY INJURED BY RAILROAD COMPANY is not a passenger, the carrier is not required to exercise that degree of vigilance required of parties bearing a relation of trust and confidence or bailment towards each other. In such case the carrier is only required to use such care and diligence as would be exercised by skillful, prudent, and discreet persons having the control and management of such business, regarding their duty to the interests of all concerned.

WHERE PARTY INJURED BY RAILROAD COMPANY is not a passenger, he is not entitled to recover if his negligence directly contributed to such injury, or if the accident could have been avoided by such care as might under all the circumstances have been reasonably expected to be exercised by one of his age and intelligence. This is true although the injury could have been prevented by the exercise of the utmost care and diligence on the part of the carrier.

OMISSION IN INSTRUCTION which inures to the advantage of appellant cannot be urged by him on appeal.

IN ACTION BY MOTHER TO RECOVER FOR INJURIES to her infant son, suffered at the hands of a railroad company at a time when he was not a passenger, she is not entitled to recover for her mental suffering, but only such pecuniary loss as would be sustained by her from loss of the services of the child during his minority. The chances of survivorship, his ability or willingness to support her, are matters of conjecture too vague to enter into an estimate of damages merely compensatory.

THE opinion states the facts.

Ridgely and Brent, for the appellant.

By Court, BOWIE, C. J. These are cross-appeals, in an action instituted under the first and second sections of article 65 of the code, by the state, for the use of a widowed mother, whose son was killed under the circumstances detailed in the bill of exceptions.

After evidence offered by both parties, a series of prayers was submitted by each, all of which were rejected, and others given by the court instead thereof, to which rejection, and the instructions given, the plaintiff and defendants severally excepted.

The counsel of the defendants having filed in these causes a declaration in writing that in the event of an affirmance of the judgment as against the plaintiff on its appeal, in the first case, the defendants will abandon their exceptions, it is proper first to inquire whether the appellant has been aggrieved by the action of the court below.

The general assembly of this state, in the year 1852, finding the common-law maxim, "Personal actions die with the person," unsuited to the circumstances and condition of the people, enacted a law entitled "An act to compensate the families of persons killed by the wrongful act, neglect, or default of another person." To make its design more obvious, the fourth section provides, "the word 'person' shall apply to bodies politic and corporate," and "all corporations shall be responsible under this act for the wrongful acts, neglect, or default of all agents employed by them."

The material provisions of this act, as well as its title, are derived from the 9 & 10 Victoria, and are embodied in article 65 (title Negligence) of the code.

The object of the several series of prayers was: 1. To furnish the jury with a standard of care and diligence required by law of the defendants to exempt them from liability for damages for the injury incurred; 2. To prescribe the care necessary to be exercised by the deceased to entitle his next of kin to recover; 3. To define the measure of damages.

The appellant's first prayer required the defendants, under the circumstances therein predicated, "to exercise the utmost care and diligence to prevent accidents endangering the life or lives of the people or inhabitants of the said city."

The second held that the defendants were bound to use all the means and measures of precaution that the highest prudence would suggest, and which it was in their power to employ, and if the use of a guard or lookout at the head or in the rear of said cars . . . was a measure by which such accidents would probably be avoided, the omission was culpable negligence.

The appellant's third prayer affirms that the jury, in the estimate of damages, should take into consideration the expense to which the plaintiff was subjected in consequence of the accident, and the loss resulting therefrom, not only to the present time, but also the probable prospective loss and expense, etc., and that in estimating the said loss and damage, the jury are not limited to the actual pecuniary loss proved in said case.

The propositions laid down by the court in the first instruction granted are:—

That the defendants in the movement and management of their cars and engines were bound to exercise the utmost care and diligence which it was within their means and power to employ to prevent accidents and injuring or endangering the

life or lives of the people. And if the jury find that the child of the plaintiff's *cestui que use* was run over and killed by the defendants' cars as described by the witnesses, "and that if the defendants, in the use and management of their cars and engines, had exercised the highest degree of care and diligence 'which it was within their means and power to employ,' the said accident could have been prevented, then the plaintiff is entitled to recover in this action; but although the jury may find that the said accident could have been prevented by the use of such care and diligence on the part of the defendants, yet the plaintiff is not entitled to recover if the jury believe the accident could have been avoided by the exercise of that degree of care by the said child which was under all the circumstances to be naturally and reasonably expected from one of said boy's age and intelligence."

The degree of care and diligence imposed by law on the defendants in the instruction given by the court is as high as that required by the appellant's prayers; the degree is the "utmost care and diligence," the "highest it was within their means and power to employ"; the only material difference is, that one of the appellant's prayers asked the court to instruct the jury specifically, "that if the use of a guard or lookout at the head or in the rear of said cars was a measure by which such accidents would probably be avoided, the omission was culpable negligence." The general terms used by the court embraced all the particulars specified by the prayer of the appellant, qualified by the words, "it was within their means and power to employ." The jury were at liberty to find under the instruction given, and perhaps did find, that the absence of the guard constituted the want of "the highest care and diligence within the means and power of the defendants," and therefore rendered their verdict in favor of the plaintiff.

The liability of the defendants in this case did not depend upon their obligations as carriers of passengers, in which character they are bound to use "the utmost care and diligence which human foresight can use": *Stockton v. Frey*, 4 Gill, 422, 423 [45 Am. Dec. 138]; *Baltimore and Ohio R. R. v. Worthington*, 21 Md. 275 [83 Am. Dec. 590]. But their liability, if any, arises upon a statute which limits the action to such wrongful act, neglect, or default "as would (if death had not ensued) have entitled the party injured to maintain an action and receive damages in respect thereof": *Vide Code*, art. 65, sec. 1.

The party injured not being a passenger, the defendants were not required to exercise that degree of vigilance which the law requires towards those to whom there is a relation of trust and confidence or bailment between the parties. "Towards the one the liability of the latter springs from a contract express or implied, and upheld by an adequate consideration; towards the other he is under no obligation but that of justice and humanity. While engaged in their lawful business both are bound to use a degree of caution suited to the exigencies of the case": *Brand v. Troy etc. R. R. Co.*, 8 Barb. 378.

In an analogous case this court said railroad companies should use "such care and diligence in using the locomotive upon the road as would be exercised by skillful, prudent, and discreet persons having the control and management of the engine, regarding their duty to the company, the demands of the public, and the interests of those having property, and having a proper desire to avoid injuring property along the road." This was said in a case of injury to property, but is cited with approbation by Redfield as applicable to persons: *Redfield on Railways*, 395; *Baltimore & S. R. R. Co. v. Woodruff*, 4 Md. 257 [59 Am. Dec. 76].

The court's instruction did not close with the definition of the degree of care and diligence on the part of defendants, but proceeded to inform the jury that although the accident could have been prevented by the exercise of such care and diligence by the defendants, yet the plaintiff is not entitled to recover if the jury believe the accident could have been avoided by the exercise of such care by the child as might, under all the circumstances, have been reasonably expected from one of his age and intelligence. In other words, if there was neglect or default on the part of the boy, or the absence of that prudence which boys of like age and capacity usually exhibit, the defendants were not liable, although by the exercise of extraordinary care on their part the accident might have been prevented.

This ruling is in conformity with all the text-writers, and the great majority of adjudged cases: *Redfield on Railways*, 337; 2 Car. & P. 780; *Catlin v. Hills*, 8 Com. B. 115.

It is objected on the part of the plaintiff below, the appellant in this case, that the court's first instruction was erroneous, in instructing the jury the action could not be maintained "if the jury believe the accident could have been avoided by the exercise of that degree of care by the said child which

was, under all the circumstances, to be naturally and reasonably expected from one of his age and intelligence"; whereas the court should have told the jury the plaintiff could not recover if the jury found "there was a want of that degree of care on the part of the said child which, under the circumstances, was naturally and reasonably to be expected in one of his age and intelligence." The question of the "want of" or "absence of" such care should have been left to the jury rather than the exercise of such care. It is difficult, if not impossible, to perceive the difference between the two propositions. In the court's instructions, the proposition is stated affirmatively; in the appellant's objection, it is negatively. The jury was to find whether there was or was not due care on the part of the deceased. They are told by the court, if they believe the accident could have been avoided by "the exercise of that degree of care," etc., the plaintiff cannot recover. The appellant insists that it is not the exercise, but the want of care (which is the non-exercise of care), that is the criterion. The principle of the common law, that a plaintiff cannot recover for injuries "to which his own negligence directly contributed," is admitted, and it seems to us it was clearly expressed by the court in the instruction given, as far as the conduct of the deceased child was concerned.

In the case of the *Baltimore & O. R. R. Co. v. Lamborn*, 12 Md. 261, and *Keech v. Baltimore & W. R. R. Co.*, 17 Id. 46, the rule of the common law, that the plaintiff could not recover for injuries to which his own negligence directly contributed, was held to apply to actions brought on the statutes therein referred to, and the instructions affirmed by the court in these cases submitted to the jury the question of negligence on the part of the plaintiff, as well as on the part of the defendants.

The same policy would require the plaintiff to show, in actions for injuries resulting in death, that neither the party injured nor the parties for whose use the action was brought had contributed, by neglect or want of care, to the calamity complained of. This omission in the instruction given inured to the advantage of the appellant, and cannot be taken advantage of on her appeal.

The objection raised by the plaintiff to the court's second instruction involves the measure of damages. In the language of the briefs, "it was erroneous,—1. Because it ignores the mental sufferings of the mother suing for damages sus-

tained by the loss of the child, and confines her claim to pecuniary damages; 2. Because it limits the pecuniary loss of the mother, the *cestui que use*, to the minority of the child, and deprives the jury of the right to award her damages for the pecuniary loss she would reasonably sustain in her advanced life for want of the labor and services of the son, even after he reached his majority. The rule should have been to allow what they considered a reasonable compensation."

In the absence of any interpretation of this act by our own courts, we must compare and weigh the reasoning of the authorities cited in which similar acts have been construed by other tribunals. First in order are the decisions in England upon the act called Lord Denman's act, 1 Redfield on Railways, 336. The observations of Coleridge, J., in the case of *Blake v. Midland R'y*, 10 Eng. L. & Eq. 467, cited by Redfield in his notes, are very strong in support of the instructions given by the court below in this case, confining the jury to the pecuniary damage sustained by the plaintiff. He says: "Our only safe course is to look at the language the legislature has employed. . . . The title of the act is for compensating families of persons, etc., not for solacing their wounded feelings." By the terms of the act, quoting the second section, "the measure of damages is not the loss or suffering of the deceased, but the injury resulting from his death to his family." This language seems more appropriate to a loss of which some estimate may be made than an "indefinite sum, independent of all pecuniary estimates, to soothe the feelings, and the decision of the amount strongly tends to the same conclusion." As we have before intimated, the title and language of the act of assembly of this state are almost literally the same with those of English statutes. The former contains, also, the provision for distributing the damages among the surviving members of deceased's family, on which the learned judge relies for adopting the principle of compensation for damages which may be estimated in money.

The American cases, arising upon acts varying in language, necessarily lead, as observed by Judge Redfield, to a diversity of decisions. We have no better guide than the construction of a statute originating in the same policy, and expressed in the same words, by enlightened jurists, distinguished for their independence and jealous regard for the rights of suitors.

It is assumed by the learned author just mentioned, as the conclusion of the best considered cases in this country, "that

mental anguish which is the natural result of the injury may be taken into the estimate of the damages to the party injured, although not of itself the foundation of the action." The connection in which this assumption is made might lead to the inference that it applied to actions brought by survivors for injuries done to their deceased ancestor, relative, or next of kin; but upon reference to the authorities cited, it will be found "that the plaintiffs in those cases were the persons sustaining the bodily harm, and in estimating their damages, their mental suffering constituted an element of compensation": *Canning v. Williamstown*, 1 Cush. 451, and *Morse v. Auburn & S. R. R. Co.*, 10 Barb. 623.

To have instructed the jury to allow "what they considered a reasonable compensation" would, in the language of the supreme court of Pennsylvania, "be giving the jury discretionary power without stint or limit, highly dangerous to the rights of the defendant, and leaving them without any rule whatever": *Rose v. Story*, 1 Pa. St. 190, 197 [44 Am. Dec. 121].

In the case of *Pennsylvania R. R. v. Kelly*, 31 Pa. St. 372, the same learned court say: "Generally speaking [they add], the influence of the court in this class of cases should be exerted to restrain those excesses into which juries are apt to run. . . . Wild verdicts are frequently rendered. And the tendency in modern times undoubtedly is to excessive damages, especially where they are to be assessed against corporations": *Id.* 379; *Scott v. Baker*, 33 *Id.* 330; *Pennsylvania R. R. Co. v. Zebe*, 33 *Id.* 419. The last objection to the second instruction granted is, that it limits the mother to compensation for the loss of her son during his minority only.

To submit to a jury the value of a life without limit as to years would have been to leave them to speculate upon its duration, without any basis of calculation. The law entitles the mother to the services of her child during his minority only (the father being dead); beyond this the chances of survivorship, his ability or willingness to support her, are matters of conjecture too vague to enter into an estimate of damages merely compensatory.

According to the appellant's theory, the mother and son are supposed to live on together to an indefinite age; the one craving sympathy and support, the other rendering reverence, obedience, and protection. Such pictures of filial piety are inestimable moral examples, beautiful to contemplate, but the law has no standard by which to measure their loss.

This court being of opinion that the several instructions granted by the court below were as favorable to the plaintiff (the appellant) as she was entitled to, and that she was not prejudiced by the rejection of the prayers submitted on her part, finds no error in the rulings of the court below in the first appeal, and will affirm the judgment.

Judgment affirmed.

CARRIER OF PASSENGERS IS BOUND to exercise the highest degree of care and skill, and is liable for the slightest negligence: *Nashville etc. R. R. Co. v. Muth*, 78 Am. Dec. 506, and note 514; *Mad River etc. R. R. Co. v. Barber*, 67 Id. 312, and note 327; note to *Baltimore etc. R. R. Co. v. Worthington*, 83 Id. 590; see also *Sprague v. Smith*, 70 Id. 424; *Chicago etc. R. R. Co. v. George*, 71 Id. 239, and notes to these cases.

LIABILITY OF PASSENGER CARRIER for injury to one not an employee or passenger, and liability for injuries to trespassers: See *Little Schuylkill etc. Co. v. Norton*, 64 Am. Dec. 672, and note 675; note to *Norton v. Western R. R. Corp.*, 69 Id. 628; *Philadelphia etc. R. R. Co. v. Hummel*, 84 Id. 457, and note. The carrier must exercise the utmost care and diligence to avoid running over a person on the track: *East Tennessee etc. R. R. Co. v. St. John*, 73 Id. 149.

PLAINTIFF CANNOT RECOVER FOR INJURY received at the hands of a railroad company if he is guilty of contributory negligence, although the carrier may have also been negligent: *Chicago etc. R. R. Co. v. Dewey*, 79 Am. Dec. 374, and note 376; *Gahagan v. Boston etc. R. R. Co.*, 79 Id. 724, and note 726; *Illinois Central R. R. Co. v. Buckner*, 81 Id. 282.

PARTY CANNOT COMPLAIN OF OMISSION to give his instructions when those given are as favorable to him as he is entitled to: *Baltimore etc. R. R. Co. v. Worthington*, 83 Am. Dec. 578, and note 589. That a party can never complain of instructions in his favor, see *Wintz v. Morrison*, 67 Id. 658; *Wood v. Chambers*, 70 Id. 382; *Hanson v. Keokuk*, 74 Id. 276.

FATHER CANNOT RECOVER FOR MENTAL SUFFERING in an action against a common carrier for injuries to his minor son: *Black v. Carrollton R. R. Co.*, 63 Am. Dec. 586, and note; see also *Chicago v. Mayor*, 68 Id. 553; *Curtis v. Rochester etc. R. R. Co.*, 75 Id. 258; *Cooper v. Mullins*, 76 Id. 638, and notes to these cases.

HIGHER DEGREE OF CARE AND DILIGENCE is required by carriers of passengers towards passengers than strangers; towards the former the utmost care and skill are required, toward the latter only such as would be exercised by discreet and careful parties, having due regard for the interests of all concerned. One not sustaining the relation of passenger cannot recover from the carrier for injury if by the exercise of care and prudence he might have avoided the injury: *Illinois Cent. R. R. Co. v. Phillips*, 55 Ill. 203; *Baltimore etc. R. R. Co. v. Breinig*, 25 Md. 387; *Bannon v. Baltimore etc. R. R. Co.*, 24 Id. 121; *Baltimore etc. R. R. Co. v. State*, 29 Id. 259, all citing the principal case.

RAILWAY COMPANY OWES HIGHER DEGREE of watchfulness and care to those sustaining the relation of passenger than to mere strangers sustaining no such relation to the company: *Jeffersonville etc. R. R. Co. v. Riley, Adm'r*, 39 Ind. 587, citing the principal case.

THE PRINCIPAL CASE IS CITED in *Baltimore etc. R. R. Co. v. State*, 30 Md. 53, holding that in an action by a father to recover injuries to his infant son

inflicted by a passenger carrier, caused by the carrier's negligence, he may recover if the injury was caused through such negligence, and the child used such care as might be reasonably expected by one of his age and intelligence, and the plaintiff was not guilty of negligence directly contributing to the injury.

THE PRINCIPAL CASE IS RE-REPORTED and a valuable note appended in 5 Am. Law Reg., N. S., 397.

STATE v. BISHOP AND MURRAY.

[24 MARYLAND, 210.]

WHEREIN GUARDIAN ILLEGALLY SELLS AND TRANSFERS the property of his ward contrary to law, without previous order of court, and converts the proceeds to his own use, it is no answer to an action on his bond by the ward that under the law the sale itself is void, and passed no title to the purchaser.

MEASURE OF DAMAGES AGAINST GUARDIAN in an action on his bond by the ward, for the illegal disposition of the latter's property by the guardian without order of court, and a conversion of the proceeds to his own use, is the value of the property illegally converted, if nothing else appears in proof.

WHEREIN GUARDIAN ILLEGALLY TRANSFERS CORPORATE STOCK standing in the name of the ward without order of court, and converts the proceeds to his own use, the ward is not confined to his action on the guardian's bond, but has the cumulative remedy against the corporation. He may repudiate the transfer as void, and recover the stock.

MEASURE OF DAMAGES IN SUIT ON GUARDIAN'S BOND. — Where ward has recovered from a corporation the value of stock owned by him, and illegally transferred by his guardian, the measure of damages in a suit on the latter's bond is the loss actually suffered by the ward from the breach of the bond.

PARTY WHO HAS CUMULATIVE REMEDIES against one or several persons to recover damages for a tort, cannot, after recovering in one form of action, recover from the same party for the same wrong in another form of action; nor, if the remedy be against several, and he recover from one, can he recover from the others for the same cause of action.

PARTY CANNOT CLAIM EXEMPTION FROM LIABILITY for his debt or contract, or reduce the amount of recovery, on the ground that some other person, who is a stranger to him, and not liable on the same obligation, has, under a mistake of law or fact, paid and indemnified the debt or obligation.

RIGHT OF ACTION ON GUARDIAN'S BOND does not arise in favor of a corporation who pays to a ward the value of stock owned by him, and illegally transferred by the guardian, such payment being made under condition that the ward should institute suit on the bond and have the action entered for the use and prosecuted for the benefit of the corporation. The latter is entitled to maintain an action against the guardian to recover the price paid him for the stock.

THE opinion contains the facts.

Dulany, for the appellants.

By Court, BARTOL, J. We entertain no doubt whatever that the breaches alleged in the amended *narr.* are within the conditions of the bond sued on, and that the fourth plea of the defendants would be no defense to the action, but would be had on demurrer. The object of the guardian's bond is to secure the ward against the illegal disposition of his property by the guardian, or its maladministration; and where a guardian illegally sells and transfers the property of the ward contrary to the act of assembly, without a previous order of the orphans' court, and converts the proceeds to his own use, it is no answer to an action on the bond by the ward that under the act of assembly the sale itself is void, and passed no title to the purchaser. In such case it is clear that the action could be maintained, and if nothing else appeared the measure of damages would be the value of the property illegally converted.

The case before us, however, is not presented in this form; it arises upon an agreed statement of facts, and the only question presented is, What is the true measure of damages upon the facts stated?

In the case of *Mayor and City Council of Baltimore v. Norman*, 4 Md. 352, it was decided that a transfer of stock standing in the name of a ward, made by a guardian without the order of the orphans' court, was, under the act of 1843, chapter 304, void, and the rights of the ward were not affected by it.

It thus appears that in a case like this the ward is not confined to his action upon the bond, but has the cumulative remedy against the corporation, may repudiate the sale as void, and recover the stock thus illegally transferred: See also *Chew v. Bank of Baltimore*, 14 Md. 300.

In this case it appears from the facts stated that the *cestuis que use* have recovered from the Fredericktown Turnpike Road Company and the Union Manufacturing Company the value of the shares of stock in those companies respectively, which had been illegally transferred by their guardian, and the question is, whether that fact reduces the measure of damages in this action, or whether they are entitled to recover in this suit the same amount as if the stock had been lost to them and they had received no indemnity or compensation whatever from the companies. The mere statement of this question, it seems to us, carries with it its own solution. No authority need be cited to establish the familiar proposition that where

a party has cumulative remedies against one person or several persons to recover compensation for a tort, he cannot, after he has recovered compensation in one form of action, recover from the same person indemnity for the same wrong in another form of action; nor, if the remedy be against several, and compensation be recovered from one, can damages for the same cause of action be afterwards recovered against the others. The measure of damages in this suit is the loss actually suffered by the *cestuis que use*, from the breach of the condition of the bond committed by the guardian, and if the sale of their stock was void under the act of 1843, and they have in fact had it or its value restored to them by the companies, then, though this fact does not defeat this action, it reduces the right of the plaintiff to recover nominal damages only, and according to the agreement in the case, a judgment for the defendants was properly entered.

It appears from the statement of facts that the two companies made it a condition precedent to their restoring the stock or its value that this suit on the bond should be instituted; and in conformity with that requirement this suit was brought, and is entered for their use and really prosecuted for their benefit. The appellants have relied upon this fact as material in the decision of the case, and have argued that it falls within the principle decided in *Merryman v. State*, 5 Har. & J. 423, and *Whiting v. Independent Mutual Ins. Co.*, 15 Md. 297.

But the distinction between those cases and this is very obvious: in them it was held that a defendant could not claim exemption from liability for his own debt or on his own contract, or reduce the amount of the plaintiff's recovery, on the ground that some other person who was a stranger to him and not liable to the plaintiff for the same debt, or in respect of the same cause of action had, under a mistake of facts or of law, paid and indemnified the plaintiff. In such case the payment does not inure to the benefit of the defendant, and this for obvious reasons. If the payment were made under a mistake of fact, the plaintiff would be liable in an action by the party from whom he had received, and if paid under a mistake of law, although he could not be compelled by an action to pay it back, yet in good conscience he ought to do so, and in neither case could the defendant, who is a stranger to the transaction, claim that the plaintiff should retain the sum so received by him from others, so that he (the defend-

ant) may be exempt from liability upon his own contract, to which they are strangers.

Here the companies were not strangers to the transaction upon which the plaintiff's right of action arose, the illegal transfer of their stock; on the contrary, they were, in contemplation of law, tort-feasors, equally with Richard C. Murray, the guardian, and were alike responsible to the wards for the stock or its value. They might be entitled to their action against Richard C. Murray, to recover back the price paid him for the stock, but they have no right of action on the guardian's bond, and cannot therefore legally claim that in this suit a larger sum should be recovered than if the case had not been entered for their use.

This court being of opinion that upon the facts stated the original *cestuis que use* are entitled to recover no more than nominal damages, the judgment appealed from will be affirmed.

Judgment affirmed.

SALE OF WARD'S PROPERTY BY GUARDIAN to pay his own debt is a breach of trust: *Hunter v. Lawrence's Adm'r*, 62 Am. Dec. 640, note 647.

WHERE GUARDIAN ILLEGALLY SELLS WARD'S PROPERTY and converts the proceeds to his own use, the ward, besides having his remedy on the guardian's bond, may repudiate the sale and recover the property: Schouler on Domestic Relations, sec. 384, citing the principal case.

RECOVERY IS BAR TO SUBSEQUENT ACTION for the same breach of covenant: *Winslow and Cannon v. Stokes*, 67 Am. Dec. 242, and note. This is true although the defendants may be different persons: *Thomason v. Odum*, 66 Id. 159, and note 164; *Lord v. Chadbourne*, 66 Id. 290, and note 296. And the recovery is binding upon parties and privies: *Lipcomb v. Postell*, 77 Id. 651, and note.

JUDGMENT AGAINST OFFICER FOR TORT is only a liquidation of damages, and is not a bar to the recovery of the amount from the sureties on his bond: *Charles v. Haskins*, 77 Am. Dec. 148.

GALLAGHER v. SHIPLEY.

[24 MARYLAND, 418.]

GENERAL RULE IS THAT TENANT UNDER FARMING LEASE or contract has no right to remove from the premises so occupied any manure made in whole or in part from the produce of the land, without an express stipulation to that effect in the agreement.

WHERE LEASE IS GENERAL IN ITS PROVISIONS and terms, and expresses nothing as to the mode in which the lessees are to use or occupy the premises, they are clothed with full power and right to occupy and use the land demised for any lawful purpose not injurious to the reversion.

STIPULATIONS CONTAINED IN LEASE as to the condition in which the property is to be returned at the end of the term, but having no relation as to an intermediate occupation, raises no presumption as to the use to which the land is to be applied.

VERBAL AGREEMENT BETWEEN LANDLORD AND TENANT cannot affect the rights of parties holding the demised premises under the lessee without notice of it.

RIGHT OF TENANT TO REMOVE MANURE. — Where a lease is general in its terms, and says nothing of the mode in which the tenant is to use the demised premises, he may use them as a corral for cattle, and when such cattle are fed with supplies procured from sources foreign to the land, he may remove all manure made by them which is not commingled with the soil, provided he uses reasonable care and skill in removing the manure from the land so as to prevent injury thereto.

THE opinion contains the facts.

Williams and Barry, for the appellants.

Machen and Fisher, for the appellee.

By Court, COCHRAN, J. The professed object of the appellee in filing this bill was to stay irreparable injury and waste, which he alleges was being committed by removing manure from land of which he was the lessor; but we have been satisfied by an examination of the record that his real purpose was to secure the manure as an accretion or appurtenance to the soil of the leased premises. It is immaterial, however, on which theory the bill goes, for both present the question as to the right of property in the manure; and as the case must ultimately turn upon the decision of that question, we think it should be dealt with at once, without regard to any of the subordinate points considered in course of the argument.

It is settled by the general current of American as well as English authorities, that a tenant, under a farming lease or contract, has no right to remove from the premises so occupied, without an express stipulation to that effect, any manure made in whole or in part from the produce of the land: *Pulteney v. Shelton*, 5 Ves. 147; S. C., 5 Id. 260, 261; *Onslow v. —*, 16 Id. 173; *Fay v. Muzzey*, 13 Gray, 55 [74 Am. Dec. 619]; *Lassell v. Reed*, 6 Me. 222; *Goodrich v. Jones*, 2 Hill, 142; *Middlebrook v. Corwin*, 15 Wend. 169; *Wetherbee v. Ellison*, 19 Vt. 379; *Plumer v. Plumer*, 30 N. H. 558. In such a case, the manure is not regarded as a product of the land to which the tenant is exclusively entitled, but as ordure or compost resulting from the consumption or decay of those products, required by the land to repair the waste to which it has been subjected in producing the crops consumed; and it is for that reason that

the law holds the manure in such a case to be an accretion to the land which the tenant cannot remove. This rule, it is insisted, applies to the present case, and in examining this proposition it will be necessary to refer with some care to the facts shown by the admissible evidence contained in the record.

The lease, exhibited by the appellee with his bill, is general in its provisions and terms; it says nothing of the mode in which the lessees were to use or occupy the demised premises; and they were clothed, in our opinion, with full power and right to occupy and use the land described in the lease for any lawful purpose not injurious to the reversion. It is true that the lease contains stipulations as to the condition in which the property is to be surrendered at the expiration of the term, but these provisions have no relation to the intermediate occupation, and of course raise no presumption as to the use to which the land was to be applied. The averment in the bill of an understanding between the appellee and lessees that the land was to be used for depasturing cattle does not affect the appellants here, nor can such an assignment limit in any degree, so far as they are concerned, the legal effect and operation of the terms of the lease. Whatever the case was as between the immediate parties to the lease, it is clear that no mere verbal understanding between them could affect the rights of persons holding under the lessees without notice of it, but the appellee does not allege, nor does he contend, that these appellants entered upon the demised premises with notice of any such understanding. We think, by the true construction of the lease, that the appellants were not bound to use the demised premises for the purposes of husbandry alone, but that they were at liberty to occupy the same for any lawful purpose whatever.

The appellee alleges that the appellants had for some months before filing the bill, and at that time were occupying and using the land in question as a corral or pen for herding large numbers of cattle brought thither to be slaughtered for the use of the armies of the United States. This fact is admitted by the answer, and it abundantly appears from the proof that the cattle there herded were fed with provender supplied altogether from sources foreign to the land; and that for the beneficial or economical use of it in that way it was necessary from time to time to remove the manure deposited on the surface. It would seem impossible on this state of case to apply the rule insisted on by the appellee. The land

furnished nothing for the support of the cattle, nor was it exhausted by cultivation or by the use to which it was applied; on the contrary, the evidence shows conclusively that it was constantly improving by accretions to the soil that could not be removed with the manure. The appellants were not occupying the land under a farming lease, and in using it for the purpose disclosed by the evidence, neither were injuring or could injure the interest or estate of the lessor. The rule governing the case of a tenant under a farming lease is founded upon facts and considerations wholly different from those shown by the proof here; and we think, as it cannot be applied to this case for that reason, that there is no substantial ground for disputing the appellants' right of property in the manner claimed by them. The appellee, however, further insists that the manure became so commingled with the soil of the land that it was impossible to remove it therefrom without removing the soil. This presumption seems in its nature to be speculative rather than positive, for even admitting, as probably was the fact, that much of the manure was trampled in and commingled with the soil, it by no means follows that such as was not trampled in could not be removed from the surface without removing the soil. The evidence shows beyond question that only such manure as remained on the surface, and capable of removal without injury to the land, was removed. How the removal of such manure could injure or affect the estate of the lessor is a matter somewhat difficult to discover. We admit that while the appellants had the right of property in such manure as was not commingled with the soil, and the consequent right of removal, they were bound to exercise their right of removal with such diligent care and skill as would prevent injury to the land. We conclude, however, from a careful review of the testimony, that reasonable skill and care were exercised by the appellants in removing the manure claimed by them. The proof shows that the implement used for that purpose was constructed with especial reference to that end, and that it was nearly if not quite impossible, in using it, to inflict any injury whatever in the way of removing the soil.

We are of opinion, looking to the facts and circumstances admitted and established by the evidence, that the court below erred in refusing to dissolve the injunction, and will therefore sign a decree reversing the order appealed from, with costs

to the appellants, dissolving the injunction and remanding the cause.

Order reversed, injunction dissolved, and cause remanded.

IN ABSENCE OF EXPRESS CONDITION IN LEASE, a tenant cannot remove manure made on the demised premises in the ordinary course of husbandry or commingled with the soil: *Daniels v. Pond*, 32 Am. Dec. 269, and note 271; *Lewis v. Jones*, 55 Id. 550, and note 554; *contra*, *Smithwick v. Ellison*, 38 Id. 697.

TENANT MAY REMOVE MANURE made in a livery-stable, or in any manner not connected with the ordinary course of agriculture: *Daniels v. Pond*, 32 Am. Dec. 269; but it is held in *Lewis v. Jones*, 55 Id. 550, that manure cannot be removed when made from hay or grain not raised on the premises, in the absence of proof as to what proportion such hay and grain bore to the whole amount raised on the premises.

PARTY TAKING POSSESSION UNDER TENANT is bound by the covenants in the latter's lease: *Winston v. President etc. Franklin Academy*, 61 Am. Dec. 540, and note 542.

CASES
IN THE
SUPREME JUDICIAL COURT
OF
MASSACHUSETTS.

STEVENS v. INHABITANTS OF BOXFORD.

[10 ALLEN, 26.]

EVIDENCE OF DUE CARE SUFFICIENT TO BE SUBMITTED TO JURY.—On a bill of exceptions an appellate court will hold that the riding of a safe and gentle horse on a dark night, by one who understands how to manage a horse, over a familiar road, and turning out upon meeting a carriage, shows reasonable care, where an action is brought to recover for an injury sustained by reason of a defective highway.

CORRECT INSTRUCTIONS IN ACTION AGAINST TOWN TO RECOVER FOR PERSONAL INJURIES SUSTAINED BY PLAINTIFF WHILE RIDING ON HORSEBACK UPON HIGHWAY, BY GOING OFF FROM BANK WHERE THERE WAS NO RAILING.—The defendants, in such case, have no ground of exception, where the jury are instructed, according to defendants' request, that "if the horse passed the bank wall in safety, and while proceeding in the adjoining field, stepped on ice and slipped down and thus injured the plaintiff, he could not recover," though the judge adds, after giving such requested instruction, that "if the horse, by the reason of a want of a railing, went over the bank wall, and immediately, and while under the same impulse or impetus, slipped on ice in the field and fell, thereby injuring the plaintiff, the town would be liable." The want of a railing in such case is a defect which must be regarded as the proximate cause of the injury

TORT to recover for a personal injury sustained by reason of a defective highway. The plaintiff's evidence tended to prove that he was twenty-seven years old; that he had lived in Boxford, at the house of Thomas Sawyer, for eighteen years; that he had always been in the habit of driving horses; that on the night of February 11, 1863, one of Sawyer's horses got away; that he thereupon mounted a gray colt, bareback and without martingales, to go after him; that the colt was gentle;

that he had frequently driven him and ridden bareback, though not without martingales; and that while going on the road five or six miles an hour, the evening being dark, he heard a carriage coming, and turned out, and immediately found himself over the bank and injured in his foot. There was testimony as to the tracks of the horse at and near the place where he went off, and as to the condition of the road. But neither the plaintiff nor the persons in the carriage were able to testify precisely where or how the injury occurred. The defendants contended that the injury occurred by reason of the plaintiff's foot coming in contact with the wheels of the carriage, and that he was thereby thrown upon the road, the horse only going off the bank; and that if the injury did not occur in that manner, the horse passed safely over the bank, and after that, while proceeding in the adjoining field, stepped on ice and fell and caused the injury. The jury were instructed as shown in the second section of *syllabus, supra*. Other facts are stated in the opinion. Verdict for plaintiff, with \$1,250 damages. Defendants alleged exceptions.

S. B. Ives, Jr., for the defendants.

J. B. Lord, for the plaintiff.

By Court, CHAPMAN, J. The first exception is to the ruling of the presiding judge, that the evidence offered by the plaintiff, tending to prove due care on his part, was sufficient in law to be submitted to the jury. The court are of opinion that this ruling was correct. The evidence tended to show that he understood how to manage a horse, and that the horse he rode was gentle and safe; and the facts proved as to the darkness of the night, the condition of the road, the turning out for the purpose of passing the carriage which he met, the place where the accident occurred, and the tracks which were seen afterwards, were sufficient to enable a jury of practical men to judge whether he used such reasonable care as the circumstances required, even though he was unable to tell precisely how and where the accident occurred. The court cannot see judicially that the jury erred in finding for the plaintiff on this point.

The only other exception which is insisted on relates to the rulings made by the judge after the defendants had made their request for instructions. These appear to be sufficiently favorable to them. Under them the jury must have found that the injury to the plaintiff was caused solely by the defect; and if

this were so, it could not be essential that they should be able to determine the precise place in the road where it occurred, or the precise manner in which it occurred. And if the horse, by reason of the want of a railing, went over the bank, and immediately, and while under the same impulse or impetus that carried him over, slipped on the ice in the field and fell, thereby injuring the plaintiff, this defect must be regarded as the proximate cause of the injury. The case of *Palmer v. Andover*, 2 Cush. 600, sustains this view, though the injury was not received within the limits of the highway; and the case of *Sparhawk v. Salem*, 1 Allen, 30 [79 Am. Dec. 700], where the plaintiff had proceeded a considerable distance before the injury happened, is clearly distinguishable from this case.

Exceptions overruled.

CASE INVOLVING PLAINTIFF'S USE OF DUE CARE SHOULD BE SUBMITTED TO JURY, WHEN: See note to *Gahagan v. Boston etc. R. R. Co.*, 79 Am. Dec. 727; *Fox v. Sackett*, post, p. 682; extended note to *O'Malley v. Dora*, 73 Id. 408, on law of the road; *Warren v. Fitchburg R. R. Co.*, 85 Id. 700, and note; *Snow v. Housatonic R. R. Co.*, 85 Id. 720, and note thereto.

BANFIELD v. WHIPPLE.

[10 ALLEN, 27.]

MASTER CANNOT BE HELD LIABLE JOINTLY WITH HIS SERVANT for an injury done by the servant, in the master's absence, to a horse hired by the master; but this rule does not apply to the case of a horse hired by one person, intrusted by him to another, and injured by the immoderate driving of the second in the presence and with the assistance of the first.

DRIVING HORSE TO DEATH, JOINT LIABILITY FOR. — Where a horse is let to A, and delivered by the owner to B, upon the credit of A, and the horse is driven to death by B, with the aid and assent of A, who is driving another horse near him on the same road, both may be held jointly liable to the owner.

EVIDENCE THAT ORIGINAL CHARGE ON BOOKS OF ACCOUNT WAS MADE TO CERTAIN PERSON IS PRIMA FACIE ONLY, and not conclusive evidence that the contract was made with him or upon his credit.

WHETHER RELATION OF MASTER AND SERVANT, OR PRINCIPAL AND AGENT, exists between defendants jointly prosecuted for a tort is a question of fact for the jury.

ASSIGNMENT OF PROPERTY TO ESCAPE LIABILITY FOR TORT. — In an action to recover damages for an injury to a hired horse, occasioned by immoderate driving, evidence is competent to prove that the defendant, immediately after the injury charged, made an assignment of all his property.

TORT against Horace Whipple and James Rowell. The writ was dated August 8, 1863. The second count in the

declaration was as follows: "And the plaintiffs further say that the said Whipple hired of them a certain horse and carriage to drive in a moderate and proper manner; and the said Whipple agreed to return said horse to the plaintiffs in good order and condition. Yet the said Whipple, wholly regardless of his duty and undertaking in the premises, delivered said horse to said Rowell to drive, and the said Rowell improperly and immoderately drove said horse to Lowell and beyond said Lowell, to wit, to Tyngsborough and Hudson; and the said Whipple aided and assented to said immoderate driving, by reason of which immoderate driving the said horse was killed by the said Whipple and Rowell, and the said Whipple never returned the said horse to the plaintiffs, but on the contrary, with said Rowell, by reason of said immoderate driving, killed said horse." Each defendant answered separately. It appeared that the defendants had arranged for a pleasure excursion together on August 6, 1863, and on the morning of that day they started from Lawrence together, each driving a horse and buggy belonging to the plaintiffs, and each accompanied by a woman. They drove a few miles beyond Lowell, where the horse called the bay colt, driven by Rowell, fell, and died in a few minutes. There was evidence tending to show that the bay colt was killed by immoderate driving. The testimony as to whom the original charge was made was conflicting. Plaintiff Banfield testified that Whipple was charged with the two horses; but the defendants testified that the bay colt was charged to Rowell and the other horse to Whipple; but the jury found that the bay colt was also hired to Whipple. On the morning of August 6th Whipple called and took a horse and buggy. Rowell soon after called and took the bay colt and buggy, delivered to him by Banfield, and soon afterwards the defendants met in Lawrence, and proceeded as above, Rowell having the full management and control of the bay colt. Plaintiffs were allowed to prove that on August 7th Whipple and Rowell made simultaneous assignments of all their property. Upon the subjects embraced in defendants' prayers for instructions, the jury were substantially instructed that the defendant Whipple was not liable unless they were satisfied that the contract of hiring was made with him as to both horses, and that both horses were delivered upon his credit; but if they were so satisfied, and that Whipple intrusted the bay colt to Rowell to drive, who killed it by immoderate driving, he was liable under the second count;

that the charges upon the order-slate were evidence upon this issue, and if made as claimed by the defendants, strong evidence against the plaintiffs, but not necessarily conclusive; that if Rowell killed the horse by immoderate driving he would be liable under the second count, whether it was hired by Whipple or himself. The jury returned a verdict for the plaintiffs, and upon inquiry by the court stated that they found a verdict against both defendants on the second count, and that the contract of hiring was made by Whipple, and the horse immoderately driven by Rowell so that he died. Defendants alleged exceptions.

E. J. Sherman, for the defendants.

D. Saunders, Jr., and G. E. Hood, for the plaintiffs.

By Court, GRAY, J. The jury, by their verdict for the plaintiffs, have found that the horse was hired of the plaintiffs by Whipple, and was driven immoderately by Rowell, with the aid and assistance of Whipple, and thereby killed. The general verdict against both defendants is not qualified, or turned into a special verdict, by the answers of the jury to the inquiries of the judge. The answer that the horse was immoderately driven by Rowell is conclusive of his liability, but does not necessarily show that Whipple might not also be liable, under proper instructions and on sufficient evidence.

It is true that a master cannot be held liable jointly with his servant for an injury done by the servant in the master's absence to a horse hired by the master: *Parsons v. Winchell*, 5 Cush. 592 [52 Am. Dec. 745]. But that rule does not apply to the case of a horse hired by one person, intrusted by him to another, and injured by the immoderate driving of the second in the presence and with the assistance of the first. If Whipple hired this horse, and co-operated in the immoderate driving, either by speaking to Rowell or to the horse, or by exciting this horse by fast driving of the other, or in any other manner, the plaintiffs' previous knowledge that this horse was to be driven by Rowell for his own pleasure could not exempt Whipple from liability.

Evidence that the original charge on the plaintiffs' books was to Rowell by name was *prima facie* only, and not conclusive, that the contract of hiring was made with Rowell: *James v. Spaulding*, 4 Gray, 451; *Lee v. Wheeler*, 11 Id. 239; *Commonwealth v. Jeffries*, 7 Allen, 564 [83 Am. Dec. 712].

Whether the relation of master and servant, or principal

and agent, existed between the defendants was a question of fact for the jury.

The specific instructions asked for were therefore rightly refused. The only instructions reported are those given "upon the subjects embraced in the prayers." The instruction that Whipple was liable if he hired both horses, and intrusted one to Rowell to drive, who killed it by immoderate driving, is to be taken as applied to the prayers for instructions, and to the admitted fact that the defendants were driving in company with each other when this horse was killed. No request was made for instructions upon the degree of presence and co-operation requisite to make Whipple liable as aiding and assisting in the immoderate driving by Rowell; and we must presume that this was covered by the instructions as to immoderate driving, and other instructions which, as the bill of exceptions states, were given and not excepted to.

The single exception taken to the admission of evidence relates to the assignments made by both defendants of all their property on the day after the accident. But these assignments, made at that time, simultaneously (Rowell being the attesting witness to Whipple's assignment), without any proof of consideration except the recitals in the assignments, were some evidence that the defendants were conscious of liability and endeavored to escape from it, the weight of which was to be determined by the jury: *Stratton v. Farwell*, Middlesex, 1843 [not reported].

Exceptions overruled.

ALL WHO AID, COMMAND, ADVISE, OR COUNTENANCE COMMISSION OF TORT by another, or who approve of it after it is done, if done for their benefit, are liable in the same manner that they would be if they had done it with their own hands: *Moir v. Hopkins*, 63 Am. Dec. 312. As to joint liability of co-trespassers, see extended note to *Kirkwood v. Miller*, 73 Id. 137-149; *Blann v. Crocheron*, 54 Id. 203; *Guille v. Swan*, 10 Id. 234; *Caldwell v. Sacra*, 12 Id. 285.

JOINT LIABILITY OF MASTER AND SERVANT FOR SERVANT'S TORTIOUS ACT: See note to *Parsons v. Winchell*, 52 Am. Dec. 748, citing the principal case; *Wright v. Wilcox*, 32 Id. 507.

LIABILITY FOR IMMODERATE DRIVING: See note to *O'Malley v. Dorn*, 73 Am. Dec. 409.

ENTRIES IN VENDOR'S BOOKS OF ACCOUNT AS EVIDENCE: See *Commonwealth v. Jeffries*, 83 Am. Dec. 712, and note 728.

RELATION OF PRINCIPAL AND AGENT IS QUESTION OF FACT FOR JURY: *Savings Fund Society v. Savings Bank*, 78 Am. Dec. 390.

THE PRINCIPAL CASE WAS CITED IN *Swaff v. Pierce*, 13 Allen, 187; *Langdon v. Hughes*, 107 Mass. 274, to the point that charges in books of account

are not written contracts, but the private memoranda of the party, and as such open to explanation. For question concerning the funds in the hands of the trustees, which were claimed by W. H. Eastman under the written assignment made by the defendant Whipple to him, on August 7, 1863, see *Bayfield v. Whipple*, 14 Allen, 13.

GREEN v. CLAY. GREEN v. COX.

[10 ALLEN, 90.]

C., HAVING LUMBER SAWED AT MILL, MAY BE, ACCORDING TO CUSTOM OF FORMER YEARS, JUSTIFIED IN MAKING PAYMENT for the sawing to J., or other persons who have charge of the mill, where a private contract exists between G., the lessee of the mill, and J., or other persons, that the latter will not collect the bills for sawing, but of which contract C. has no notice.

SAWING LUMBER, WHO MAY CONTRACT AND RECEIVE PAYMENT FOR. — A person put in charge of a saw-mill by an agent of the lessee or owner thereof may contract with others to saw lumber for them, and, in the absence of a known contract to the contrary, may lawfully receive payment in money or otherwise for such lumber sawed by him at the mill. And evidence of a custom in former years to make such payments to other persons so put in charge of the mill is competent, though not material.

REFUSAL OF JUDGE TO MAKE SPECIAL INQUIRY OF JURY, on the morning after they had rendered their verdict, and after their separation, as to their finding upon a particular point, constitutes no ground of exception, because the inquiry would be too late. These inquiries are always made when the jury render their verdict, and before they separate.

CONTRACT to recover compensation for sawing lumber at the plaintiff's mill. The answer in each case denied the making of any contract therefor with the plaintiff, and averred that the contract for the same was made with one Jenkins, who had the use and occupation of the mill, and to whom the defendants had made payment by work done for him. Declarations in set-off were also filed, with items for services rendered and materials furnished. The two cases were tried together. The sawing for the defendants was done during the continuance of the lease to Jenkins. Defendants, under objection, introduced evidence tending to show that they and other persons had paid Anderson, while he carried on the mill, for sawing done by him there, in materials, labor, and provisions. They also introduced evidence tending to prove the items for labor and materials, mentioned in their declarations in set-off as having been rendered and furnished chiefly to Jenkins, but in part to Wiley, at a time when he was in charge of the mill while Jenkins was sick. The judge ruled that any labor or

materials furnished to Wiley, acting as the plaintiff's agent in running the mill, might be considered in set-off. The jury returned verdicts for the plaintiff, and found specially that "by the contract between Jenkins and Wiley, acting as the agent of the plaintiff, Jenkins did not agree not to collect any but small outside bills." These verdicts were returned at half-past six in the afternoon, the counsel of the parties not being present. On the next morning, at the opening of court, the plaintiff requested the court to inquire of the jury "whether they found the sums claimed in the defendants' declarations in set-off or on payment." But the judge declined to put the inquiry. The plaintiff alleged exceptions. Other facts are stated in the opinion.

A. V. Lynde, for the plaintiff.

C. P. Judd, for the defendants.

By Court, CHAPMAN, J. The facts in these cases are not very clearly stated in the bill of exceptions. The plaintiff appears to have been the lessee of the saw-mill in question, and to have employed one Wiley, who had for many years managed it, to act as his agent. Wiley let it for some years to one Anderson, and in the winter of 1862-63 let it to Henry Jenkins. The terms of this letting were, that Jenkins was to furnish the labor and certain other things, and have half the earnings, and half the chips, bark, and sawdust. Whether he was to collect the earnings and pay half to the plaintiff, or the plaintiff was to collect them and pay half to him, was a matter in dispute; but the jury found specially that Jenkins did not agree that he would not collect them. Jenkins appears to have had charge of the whole business, and it does not appear that any of the customers had notice that the plaintiff had any interest in the matter before the business was closed.

The present actions are brought to recover compensation for sawing done by Jenkins for each of the defendants. Under such a contract as is stated in the bill of exceptions, it is difficult to see how the plaintiff can maintain the actions; but no exception is taken on this point. Clearly there is no ground on which it can be contended that the defendants had not a right to contract with Jenkins for sawing, and pay him for the work. The instructions to the jury were sufficiently favorable to the plaintiff on this point.

The evidence that it had been the custom in former years to make payment to those persons who had occupied the mill under contracts with Wiley was not material; but it was not inadmissible. If it had appeared that Jenkins had made a private contract with the plaintiff that he would not collect the bills for sawing, of which contract the defendants were ignorant, the defendants might have been justified in making payment for sawing to the person who had charge of the mill, as they and others had been accustomed to do in former years. But in the absence of any such agreement on the part of Jenkins, his right to receive payment would result legally from his contract.

The plaintiff's counsel requested the presiding judge to inquire of the jury "whether they found the sums claimed in the defendants' declarations in set-off or on payment." The judge declined to make the inquiry, and his decision is excepted to. It is not unusual, and it is often very convenient in our system of practice, to make inquiries of the jury in respect to their findings of particular facts. But these inquiries are always made when they render their verdict, and before they separate. After they have rendered it and separated, it would be unsafe to permit such inquiries to be made; for the jurors are no longer under restraint as to conversing with any person or hearing the conversation of any person in regard to the case. The plaintiff's request was not made till the morning after the jury had rendered their verdict and separated. This was too late. The judge had no discretionary right to make the inquiry at that time, without the consent of both parties.

But we cannot see how the question was material. It is stated that the court ruled that no labor performed for Jenkins, or cash paid or materials furnished to him, could be allowed in set-off; but the same, so far as they had been received and allowed by him in payment for sawing done, might be considered in support of the plea of payment. Under this instruction, all that was allowed must have been received by him in payment, and the account in set-off was excluded.

The question of what costs the plaintiff is entitled to recover has been argued, but it is not brought here by the bill of exceptions. The case is not here, but merely the questions stated in the bill. But under the instruction above mentioned it is difficult to see how any question as to costs can arise.

Exceptions overruled.

CITATION OF PRINCIPAL CASE. — After the decision upon the main question raised in the principal case, the plaintiff claimed full costs, which the clerk disallowed, and the plaintiff appealed. The plaintiff's verdict was shown in the principal case to be for \$3.19, and the point on appeal was, if the plaintiff's demand was reduced below twenty dollars by the allowance of the account in set-off, he was entitled to recover full costs; but if it was so reduced by payment, he was not thus entitled. Taxation for full costs was affirmed: *Green v. Clay*, 14 Allen, 161, 162.

GANNON v. HARGADON.

[10 ALLEN, 106.]

NO RIGHT TO REGULATE OR CONTROL SURFACE DRAINAGE OF WATER CAN BE ASSERTED by owner of one lot over that of his neighbor, where there is no watercourse by grant or prescription, and no stipulation exists between such conterminous proprietors of land concerning the mode in which their respective parcels shall be occupied and improved.

SURFACE WATER UPON LAND, OWNER MAY CONTROL. — The owner of land may lawfully occupy and improve it in such manner as to prevent surface water which accumulates elsewhere from coming upon it, or he may alter the course of surface water which has accumulated thereon or come upon it from elsewhere, although the water is thereby made to flow upon the adjoining land of another, and to stand there in unusual quantities, or to pass into and over the same in greater quantities or in other directions than it was accustomed to flow, thereby occasioning loss to the conterminous owner.

INJURIES CAUSED BY OWNER'S LAWFUL CONTROL OF SURFACE WATER ARE DAMNUM ABSQUE INJURIA. The right of a party to the free and unfettered control of his own land above, upon, and beneath the surface cannot be interfered with or restrained by any considerations of injury to others which may be occasioned by the flow of mere surface water in consequence of the lawful appropriation of land by its owner to a particular use or mode of enjoyment. If such an act causes damages to adjacent land, it is *damnum absque injuria*.

TORT to recover damages for turning a stream of water so that it flowed upon the plaintiff's close. The evidence tended to show that the defendant owned a lot of land lying to the west of the plaintiff's; that along the easterly line of the defendant's lot there was a way which extended farther to the north; that on the west side of the way, and north of the defendant's lot, a ditch was dug in 1863, which extended down to within a few feet of the defendant's lot; that a few feet below the northerly line of the defendant's lot there was a low place in the way, below which deep ruts had been made; that in March, 1863, the melting of the snow and the spring rains caused a considerable flow of surface water from the land to the north of the defendant's lot, through the ditch, and over

the way, and through the ruts upon the defendant's lot; and that the defendant thereupon placed turfs in the ruts just below the low place in the way, and upon his own land, for the purpose of protecting the way from injury, and thereby caused the water to flow off upon the plaintiff's land. Verdict for the plaintiff, and the defendant alleged exceptions.

D. E. Ware, for the defendant.

J. Rutter, for the plaintiff.

By Court, BIGELOW, C. J. It seems to us that the instructions for which the defendant asked should have been given, and that those under which the case was submitted to the jury were not in accordance with the principles recognized and adopted in cases recently adjudicated by this court. The right of an owner of land to occupy and improve it in such manner and for such purposes as he may see fit, either by changing the surface or the erection of buildings or other structures thereon, is not restricted or modified by the fact that his own land is so situated with reference to that of adjoining owners that an alteration in the mode of its improvement or occupation in any portion of it will cause water, which may accumulate thereon by rains and snows falling on its surface or flowing on to it over the surface of adjacent lots, either to stand in unusual quantities on other adjacent lands, or pass into and over the same in greater quantities or in other directions than they were accustomed to flow: *Luther v. Winnisimmet Co.*, 9 Cush. 171; *Flagg v. Worcester*, 13 Gray, 601; *Dickinson v. Worcester*, 7 Allen, 19. The point of these decisions is, that where there is no watercourse by grant or prescription, and no stipulation exists between conterminous proprietors of land concerning the mode in which their respective parcels shall be occupied and improved, no right to regulate or control the surface drainage of water can be asserted by the owner of one lot over that of his neighbor. *Cujus est solum, ejus est usque ad cælum*, is a general rule applicable to the use and enjoyment of real property, and the right of a party to the free and unfettered control of his own land above, upon, and beneath the surface cannot be interfered with or restrained by any considerations of injury to others which may be occasioned by the flow of mere surface water in consequence of the lawful appropriation of land by its owner to a particular use or mode of enjoyment. Nor is it at all material, in the application of this principle of law, whether a party obstructs

or changes the direction and flow of surface water by preventing it from coming within the limits of his land, or by erecting barriers or changing the level of the soil so as to turn it off in a new course after it has come within his boundaries. The obstruction of surface water or an alteration in the flow of it affords no cause of action in behalf of a person who may suffer loss or detriment therefrom against one who does no act inconsistent with the due exercise of dominion over his own soil. This principle seems to have been lost sight of in the instructions given to the jury. While the right of the owner of land to improve it and to change its surface so as to exclude surface water from it is fully recognized, even although such exclusion may cause the water to flow on to a neighbor's land, it seems to be assumed that he would be liable in damages if, after suffering the water to come on his land, he obstructed it and caused it to flow in a new direction on land of a conterminous proprietor, where it had not previously been accustomed to flow. But we know of no such distinction. A party may improve any portion of his land, although he may thereby cause the surface water flowing thereon, whencesoever it may come, to pass off in a different direction and in larger quantities than previously. If such an act causes damages to adjacent land, it is *damnum absque injuria*. On this point the instructions were clearly erroneous.

Exceptions sustained.

SURFACE WATER—RIGHTS OF OWNER AND ADJACENT PROPRIETORS: *Hooper v. Wilkinson*, 77 Am. Dec. 194; *Kauffman v. Griesemer*, 67 Id. 437; *Barl v. De Hart*, 72 Id. 395; *Overton v. Sawyer*, 62 Id. 170, and notes to these cases; note to *Barry v. City of Lowell*, 85 Id. 690.

THE PRINCIPAL CASE WAS CITED in each of the following authorities, and to the point stated: The obstruction of surface water, or an alteration in the flow of it, affords no cause of action in behalf of a person who may suffer loss or detriment therefrom against one who does no act inconsistent with the due exercise of dominion over his own soil: *O'Connor v. Fond du Lac etc. Ry Co.*, 52 Wis. 531; *Weis v. City of Madison*, 75 Ind. 256; *Gillham v. Madison Co. R. R. Co.*, 49 Ill. 486; *Ogburn v. Connor*, 46 Cal. 351. Thus a proprietor of land may erect structures upon it as solid and as high as he pleases, without regard to their effect upon surface water which would otherwise come from the adjoining lands upon his soil: *Bates v. Smith*, 100 Mass. 182; *Inhabitants of Franklin v. Fisk*, 13 Allen, 212; *Macomber v. Godfrey*, 108 Mass. 221. And the owner of land is not liable for not preventing surface water from accumulating thereon and flowing thence upon the adjoining land of another, to his injury: *Morrill v. Hurley*, 120 Id. 102. The doctrines of the principal case were approved in *Taylor v. Fickas*, 64 Ind. 173; *Cairo etc. R. R. Co. v. Stevens*, 73 Id. 282; and referred to in *Pettigrew v. Village of Evansville*, 25 Wis. 232.

CLARK v. PARKINSON.

[10 ALLEN, 123.]

OFFICER WHO SERVES WRIT OF POSSESSION HAS NO AUTHORITY BY HIS PRECEPT TO REMOVE OR EXPEL from the premises third persons who have been in possession since the suit was commenced in which the writ issued, claiming title in themselves, who were not defendants in such suit, who do not claim under the person against whom that writ runs, and who do not resist the officer in his attempt to remove the latter and those claiming under him.

BOND OF INDEMNITY IS USUALLY TAKEN IN ENGLAND BY OFFICER WHO SERVES WRIT OF POSSESSION.

PETITION by a deputy sheriff for an attachment for contempt against the respondents for resisting the service of a writ of possession issued by the court and committed to the petitioner for service. It appeared that the suit in which the writ of possession issued was brought against a widow, who at the time of the commencement thereof was in actual occupation of the premises, her son and daughter living with her and claiming title to the premises under their father. The son, who was one of the respondents in this petition, was then under twenty-one years of age. The other respondent married the daughter after the commencement of the suit, and at the time of the marriage came upon the premises, claiming title in right of his wife. The respondents were not parties to the suit in which the writ of possession issued, and they did not resist the removal of the defendant in that suit from the premises, or oppose the officer's putting the plaintiff in possession, so far as that could be done without removing them. But they did threaten and were prepared to use force to prevent the officer from removing them from the land, contending that the precept gave him no right or authority to so expel them, and that it could be fully executed without putting them out.

J. G. Abbott and G. A. Somerby, for the petitioner.

T. H. Sweetser and W. S. Gardner, for the respondents.

By Court, HOAR, J. The court are of opinion that an attachment for contempt should not be granted, because an officer serving a writ of possession has no authority by his precept to remove from the land described therein any person who is not a defendant in the suit in which the writ issued, nor holding under a defendant, and who was in occupation of the land at the time the suit was commenced, claiming by a

title independent of the defendant. The writ of possession is the result or fruit of a judgment, and the judgment is the legal determination of the rights of those only who are parties or privies to it. Even a judgment *in rem* is binding upon all persons in interest only because all persons in interest are required and have a right to come in and assert their title to the property which the judgment binds in the suit or proceeding in which the judgment is rendered.

It is apparent that the judgment of the court in a real action, although it may determine, as against the tenant, that he held unlawful possession of the demanded premises at the time of bringing the suit, cannot decide this as against any person not privy in the estate with him. The judgment may be recovered upon default, which is taken as the confession of the tenant, and can bind no one but himself and those claiming under him. If it is the result of a trial, there is no good reason why it should be held more conclusive upon the possession than upon the title. In either case it is a judgment between the parties, upon such a case as they have chosen or have been able to present.

The officer who serves the writ may take a bond of indemnity, and the English text-books all state that it is the usual practice to do so. This may dispose of the objection that he is required by his precept to do a precise thing, and that he should not have to determine at his peril whether he is thereby committing a trespass. The writ is procured by the demandant in the real action, and it is for him to take care that he includes in his suit all the actual parties in possession claiming title.

We find that the text-books on the duties of sheriffs all state in general terms that in serving a writ of possession he should remove all persons from the premises; and the digests and *dicta* in reported cases undoubtedly contain a similar statement. They all adopt substantially the same language, which is taken from *Upton v. Wells*, 1 Leon. 145; Com. Dig., tit. Execution, A, 5; Crocker on Sheriffs, secs. 554, 556, 557; Allen on Sheriffs, 251; N. E. Sheriff, 141. In *Howe v. Butterfield*, 4 Cush. 305 [50 Am. Dec. 785], it was said by Mr. Justice Wilde that an officer was authorized and bound, for the purpose of delivering possession of a house, "to remove from the possession all persons therein, and especially those claiming under the party against whom judgment had been recovered." But all these expressions must be construed *secundum subjectam*

materiam, and as referring to the tenant, or persons in privity with the tenant, or mere strangers or intruders. No case has been cited in which it was decided that one in possession before the commencement of the suit could be lawfully dispossessed upon an execution issuing upon a judgment in a suit between third persons. And in *Gwynne on Sheriffs*, 418, the rule is stated otherwise, and the true distinction made. In *Ex parte Reynolds*, 1 Caines, 500, it is said to be "a settled rule of practice that no tenant who was in possession anterior to the commencement of an ejectment can be dispossessed upon a judgment and writ of possession to which he is no party"; and a writ of restitution was ordered. To the same effect are the Kentucky cases of *McChord v. McClintock*, 5 Litt. 305; *Chiles v. Stephens*, 1 A. K. Marsh. 333; *Long v. Morton*, 2 Id. 40. See also 2 Tidd's Practice, 1033; *Johnson v. Fullerton*, 44 Pa. St. 466.

Petition dismissed.

WRIT OF POSSESSION MAY BE EXPIUNED by turning out all tenants at will or sufferance, whether they entered before or after the commencement of the action: *Mattox v. Helm*, 15 Am. Dec. 64.

THE PRINCIPAL CASE WAS CITED in *Smith v. Pretty*, 22 Wis. 655, to the point that a writ of possession should not be executed against one in possession at the time the suit was commenced, nor against one who enters into possession during the pendency of the suit, where such person, in either case, claims under an adverse, paramount title.

STEVENS v. STEVENS.

[10 ALLEN, 146.]

DOCTRINE OF RELATION AS APPLIED TO NOTES GIVEN FOR PURCHASE-MONEY. — Where one purchases a piece of land with a dwelling-house thereon, and on the day of receiving his deed borrows money, which he applies in part payment therefor, and shortly afterwards, on the same day, executes a note for the money so borrowed, the note is to be regarded as relating back to the time of the actual loan, and as an existing debt at the time of the purchase.

HOMESTEAD CANNOT BE CLAIMED WHERE PURCHASE-MONEY IS UNPAID, WHEN. — If the purchaser of land with a dwelling-house thereon on the day of receiving his deed borrows money, which he applies in part payment therefor, and shortly afterwards, on the same day, executes a note for the money so borrowed, and judgment is subsequently recovered upon the note, and execution levied upon the premises, the tenant cannot claim a homestead therein as against the title acquired by the demandant under his levy.

WRIT of entry to recover a piece of land with a dwelling-house thereon in Marlborough. On April 1, 1856, at ten o'clock in the forenoon, the tenant received a deed of the premises, and on the same day moved into the house with his family. On the morning of the same day the demandant lent some money to the tenant, which the latter paid to his grantor at the time of receiving his deed, as part of the consideration. At about one o'clock in the afternoon of the same day the tenant executed to the demandant two notes for the money so borrowed, upon which the demandant subsequently recovered judgment, and levied his execution upon the premises. Judgment was rendered for the demandant, subject to an estate of homestead in the tenant. Demandant appealed.

T. H. Sweetser, for the demandant.

T. C. Hurd, for the tenant.

The COURT. On the peculiar facts of this case, we think the debt on which the demandant recovered judgment, and for which he obtained execution, which he levied on the demanded premises, must be regarded as a debt contracted previous to the purchase of the demanded premises; and that the tenant cannot claim a homestead therein under statutes of 1855, c. 238, as against the title acquired by the demandant under his levy. The money was clearly lent by the demandant previous to the purchase of the estate, because it was intended to be used, and was in fact appropriated, to complete the purchase and obtain the delivery of the deed. The giving of the notes on the same day for the amount lent cannot be considered, under the circumstances of this case, as a payment of the loan, or as the contracting of a new debt. There was in fact but a single transaction; the notes were given only as evidence of the amount of the loan, and must be regarded as relating back to and constituting a part of the *res gestæ* attending the negotiation between the parties.

Judgment for the demandant.

RELATION, DOCTRINE OF, GENERALLY: See extended note to *Jackson v. Ramsay*, 15 Am. Dec. 246-255.

DEBT FOR PURCHASE-MONEY OF HOMESTEAD IS NOT DEBT CONTRACTED AFTER PURCHASE of the homestead so as to render the property exempt as to such debt: *Christy v. Dyer*, 81 Am. Dec. 493, and note 497.

WILLARD v. KIMBALL.

[10 ALLEN, 211.]

ACTION CANNOT BE MAINTAINED BY OWNER OF GOODS AGAINST SHERIFF, or his deputy personally, for taking such goods under a writ of replevin against another person having them in possession.

FAILURE OF PLAINTIFF IN REPLEVIN TO MAINTAIN HIS ACTION will not render the officer who served the writ liable in damages to the defendant, or to any other person who may have a claim to the replevied property.

REPLEVIN — QUESTION OF PROPERTY, HOW TRIED. — By the English law, if the defendant in replevin claim property in the goods or chattels described in the writ, the officer cannot lawfully deliver them to the plaintiff until the question of property has been determined in his favor on a writ of *de proprietate probanda*, sued out by him. In Massachusetts, the question of property is to be tried in the replevin suit.

TRESPASS IS MAINTAINABLE, UNDER ENGLISH LAW, AGAINST OFFICER SERVING WRIT OF REPLEVIN and delivering goods and chattels to the plaintiff, where the defendant in replevin claims property in them, and the plaintiff has not sued out his writ of *de proprietate probanda*.

THE facts are stated in the opinion.

G. A. Somerby, for the plaintiff.

T. H. Sweetser and J. Nickerson, for the defendant.

By Court, METCALF, J. This is an action of tort in which the defendant, sheriff of Middlesex, is sued for the conversion by his deputy of 220 tons of coal, the property of the plaintiff. The defendant's answer denies that the coal was the property of the plaintiff, and also alleges that his deputy took possession of the coal on a writ of replevin in favor of Sinnickson and Glover of Philadelphia, against William A. Knowles, which action of replevin was entered in the superior court in Middlesex, and was pending there when said answer was filed.

At the trial of the present case in the superior court in this county it was ruled that the action could not be maintained, and a verdict was returned for the defendant. The plaintiff alleged exceptions to this ruling, and an elaborate argument has been had upon the complicated evidence contained in the bill of exceptions as to the legal ownership of the coal. But we are neither required nor inclined to examine the question of ownership; because, if we were satisfied that the plaintiff is the legal owner of the coal, we deem it clear, on the papers in the case, that he has no legal cause of action against the defendant or against his deputy. And it is not material whether

the judge of the superior court took or did not take this ground of defense into consideration when he ruled that the action could not be maintained.

The papers show the facts alleged in the defendant's answer to be true; that a writ of replevin in due form of law was put into the deputy's hands, sued out by the persons named in the answer, against William A. Knowles, in whose possession the coal then was, and that the deputy served that writ in all particulars in the manner prescribed by law, taking the coal from the possession of Knowles. This shows a justification of the deputy in serving the writ. Neither he personally, nor the defendant, whose deputy he is, can be held liable in damages to this plaintiff for that service, even though it could be proved that the plaintiffs in that action of replevin had no rightful claim to the coal, and that this plaintiff was sole owner of it. The deputy did what his precept commanded him to do, and nothing more. What the result of that action of replevin was we are not informed, and need not know,—whether it is still undecided, or whether judgment has been rendered for the defendant in replevin. There can be no pretense, we think, that the failure of a plaintiff in replevin to maintain his action renders the officer who served the writ liable in damages to the defendant, or to any other person who may have a claim to the replevied property.

By the English law, if the defendant in replevin claim property in the goods or chattels described in the writ, the officer cannot lawfully deliver them to the plaintiff until the question of property has been determined in his favor on a writ *de proprietate probanda*, sued out by him: Dalton on Sheriffs, 435; 3 Stephens's Nisi Prius, 2487, 2488; 5 Dane Abr. 526. And authorities were cited by the plaintiff's counsel which show that trespass is maintainable against the officer if he, in such case, serves the writ and delivers the goods or chattels to the plaintiff. But as we have no such law, these authorities do not aid the plaintiff. By our law the question of property is to be tried in the replevin suit.

In *Hallett v. Byrt*, Carth. 381,—which was an action of trespass for taking the plaintiff's cows, and in which the defendant pleaded that he, as an officer, took them on a writ of replevin,—there is a *dictum* of Lord Holt, which, in our judgment, states the law correctly. "There is," said he, "a difference between a replevin and other process of law, with respect to the officers; for in replevin they are expressly commanded

what to take *in specie*; but in writs of execution the words are general, namely, to levy of the goods of the party, and therefore it is at their peril if they take another man's goods; for in that case an action of trespass will lie." And the supreme court of New York has decided in the case of *Foster v. Pettibone*, 20 Barb. 350, that trespass cannot be maintained by the owner of goods against a sheriff for taking them under and pursuant to a writ of replevin against another person having them in possession. In Bac. Abr., tit. Trespass, G, 1, and Trover, D, *Hallett v. Byrt*, *supra*, is cited to the position that neither trespass nor trover will lie against an officer for taking on a writ of replevin the goods therein specified as the property of A, though they may have been the property of B: See also Vin. Abr., tit. Trespass, F, a, 2, F, a, 4.

Whether an officer would be liable to the true owner of goods if, on a writ of replevin commanding him to take them from the possession of the defendant in replevin, he should take them from such owner, or from some other person, is not a question now before us: See *Shipman v. Clark*, 4 Denio, 448 [47 Am. Dec. 264]; and *Stimpson v. Reynolds*, 14 Barb. 508.

Exceptions overruled.

OFFICER IN REPLEVIN MAY TAKE PROPERTY DESCRIBED IN WRIT from the possession of a stranger to whom it belongs, and he is justified by his writ; but the party in whose behalf the writ issued is answerable for the wrong done: *Shipman v. Clark*, 47 Am. Dec. 264, and note 265; note to *Marshall v. Davis*, 19 Id. 468.

CLAIM OF PROPERTY, WHEN MADE IN REPLEVIN, MUST BE TRIED before the property can be removed or the defendant dispossessed: *Lisher v. Pierson*, 20 Am. Dec. 612; and previous to the amendment of the statute relative to replevins, the trial of such claim in New York was had on a writ *de proprietate probanda*: See note to same case, p. 616.

CITATIONS OF PRINCIPAL CASE. — In each of the following cases the principal one was cited; not, however, as strictly sustaining the points stated, but more to call attention to the fact that they were suggested by the principal case, though not directly passed upon in it. One whose possession of goods is merely colorable cannot maintain an action against an officer for taking them upon a writ of replevin against the true owner: *Billings v. Thomas*, 114 Mass. 573. And an officer who has taken property upon a writ of replevin cannot justify as against its owner without showing that he took it from the possession of the person named as defendant in the replevin writ: *Id.* 574. One whose property has been replevied by a writ against his agent or his bailee can retake it by replevin from the plaintiff in the first action, even during the pendency of that action. But he must wait until the transfer by the sheriff has been completed; for while the property is in his hands, and he is actually engaged in transferring it to the possession of the defendant, it is *in custodia legis*, and the officer cannot be disturbed while making the transfer: *White v. Dolliver*, 113 Id. 407.

GILMAN v. EASTERN R. R. CORPORATION.

[10 ALLEN, 223.]

SERVANT, BY ENTERING INTO HIS MASTER'S SERVICE, ASSUMES ALL RISKS OF THAT SERVICE which the master cannot control, including those arising from the negligence of his fellow-servants. Thus risks from the negligence of a switchman, like those from the negligence of the engineer and other servants in charge of a railroad train, come within the rule.

WHO ARE FELLOW-SERVANTS. — Where one servant is injured by the negligence of another, it is immaterial whether he who causes and he who sustains the injury are or are not engaged in the same or similar labor, or in positions of equal grade or authority. If they are acting together under one master in carrying out a common object, they are fellow-servants. Thus one who repairs cars and a switchman are fellow-servants.

MASTER IS BOUND TO USE ORDINARY CARE IN PROVIDING SUITABLE STRUCTURES, engines, tools, and apparatus, and in selecting proper servants, and is liable to any of their fellow-servants for his negligence in these respects. And it makes no difference whether the master is an individual or a corporation; in either case, he is responsible to his servants for his own negligence, but not for that of their fellow-servants.

RULE THAT MASTER IS NOT LIABLE FOR INJURIES TO SERVANT BY NEGLIGENCE OF FELLOW-SERVANT has been upheld in Massachusetts under a great variety of circumstances. See illustrations in this case.

THAT MASTER WAS NEGLIGENT IN EMPLOYING HABITUAL DRUNKARD AS SWITCHMAN, thereby occasioning an accident, is a question for the jury.

RAILROAD CORPORATION IS NOT LIABLE TO PERSON EMPLOYED BY IT TO REPAIR ITS CARS, for a personal injury arising from the negligence of a switchman in failing to properly adjust a switch upon the track over which he is carried by the corporation, free of charge, between his home and the place of his work, provided the company has used due care in the selection of the switchman.

RAILROAD COMPANY IS LIABLE TO PERSON EMPLOYED BY IT TO REPAIR ITS CARS, for a personal injury arising from the negligence of a switchman in failing to perform his duty, where the switchman is an habitual drunkard, and this fact was known, or ought to have been known, to the company, and the injury resulted from his intoxication.

PLAINTIFF MUST PROVE DUE CARE ON HIS OWN PART in order to maintain an action to recover damages for a personal injury caused by the negligence of another.

TORT to recover damages for a personal injury. At the trial, the plaintiff in his opening stated that he expected to prove certain facts, which were substantially as follows: That the plaintiff was employed by the defendants as a carpenter in their repair-shop; that he lived about four miles from where he was employed to work in repairing gravel-cars; that the company agreed to carry him back and forth free of expense; that the plaintiff had no control whatever over the trains; and that the plaintiff, while being carried one day from his work upon a flat platform-car, was injured under the following cir-

cumstances: The car had no seats, sides, or railing, and was pushed by an engine, the tender of the engine being between the engine and the car. When the train reached its stopping-place this platform-car was detached from the tender, while the train was in motion, for the purpose of having the car switched off upon a side-track and allowing the tender and engine to follow on a different track to the engine-house. To do this it was necessary for the switchman to shift the track before the car arrived at the switch, and after this car had passed upon the side-track, to change the track back again so as to permit the tender and engine to pass upon the main track. When the car was in the proper place, the switchman employed by the defendants failed to change the switch, and in attempting to do so left the switch about half-way between the two tracks, so that if the car had proceeded its whole length it would have run off the track and exposed the plaintiff to great injury. Seeing this, the brakeman immediately attempted to stop the car, to prevent its running off the track. Its speed was so greatly and suddenly checked that the tender and engine came upon it, and the plaintiff, who was sitting upon the floor of the car, in the use of due care, was thrown therefrom upon the track, and the tender passed over his right leg, crushing it, and rendering amputation necessary. The plaintiff further expected to prove that the switchman had been employed at this switch by the defendants for two years immediately prior to said injury; that he was of grossly intemperate habits, and an habitual drunkard; that he was grossly intoxicated at the time of the accident, which was the reason why he could not change the switch, and so placed it that the car would have run off the track if it had not been stopped; that when first employed by the defendants he had the reputation in the community where the accident occurred and where he lived of being a man of grossly intemperate habits, and an habitual drunkard; and that while in their employment he was drunk every night. It seems, however, that the plaintiff had no knowledge of the switchman or his habits until after the accident. The judge stated that he was in doubt whether, if these facts were proved, the plaintiff would be entitled to recover. The case was reserved, by consent of the parties thereto, for the determination of the whole court.

G. A. Somerby, for the plaintiff.

J. G. Abbott and C. M. Ellis, for the defendants.

By Court, GRAY, J. The case presented by this report is to be determined by the application of rules now too well established to require an elaborate statement of the reasons on which they are founded, or an extended examination of the authorities by which they are supported.

A servant, by entering into his master's service, assumes all the risks of that service which the master cannot control, including those arising from the negligence of his fellow-servants. In case of an injury of one servant by the negligence of another, it is immaterial whether he who causes and he who sustains the injury are or are not engaged in the same or similar labor, or in positions of equal grade or authority. If they are acting together under one master in carrying out a common object, they are fellow-servants. The master, indeed, is bound to use ordinary care in providing suitable structures, engines, tools, and apparatus, and in selecting proper servants, and is liable to other servants in the same employment, if they are injured by his own neglect of duty. But it makes no difference whether the master is an individual or a corporation; in either case he is responsible to his servants for his own negligence, but not for that of their fellow-servants.

The first attempt to hold a master responsible to one servant for the negligence of another was made in England less than thirty years ago, and was defeated by the judgment of the court of exchequer: *Priestley v. Fowler*, 3 Mees. & W. 1. Not long afterwards a similar attempt was made in this court, with the like result, as announced in an elaborate opinion of the late chief justice: *Farwell v. Boston and Worcester R. R.*, 4 Met. 49 [38 Am. Dec. 339]. Many other cases followed in Great Britain, in which the English courts uniformly maintained the same doctrine, but the Scotch judges were less consistent. At last two cases were brought by appeal from the courts of Scotland to the House of Lords, there argued by the ablest counsel, and after deliberate advisement and careful examination of all the English and Scotch cases and of the opinion of Chief Justice Shaw, decided, according to the unanimous opinion of lords Cranworth, Chelmsford, Brougham, and Wensleydale, in favor of the master, upon principles of general jurisprudence, applicable alike to England and Scotland: *Bartonshill Coal Co. v. Reid*, 3 Macq. 266, 300. In the quaint phrase of the reporter, "Reid and McGuire were both victims of the same accident, which, though melancholy, has settled the law": *Bartonshill Coal Co. v. Reid*, 301, note.

In this court, the rule has been upheld under a great variety of circumstances. A railroad corporation has been held not to be liable to an engineer on a train for an accident from the negligence of a switchman: *Farwell v. Boston and Worcester R. R.*, *supra*; nor to one brakeman for the negligence of another on a different train: *Hayes v. Western R. R.*, 3 Cush. 270. So a woman working in a manufactory cannot maintain an action against the corporation owning it for an injury occasioned by the negligence of the superintendent: *Albro v. Agawam Canal Co.*, 6 Id. 75. A railroad corporation has been held not to be responsible in damages for an injury to an apprentice in its machine-shop, while acting as fireman on a train, for a defect in a switch, where no want of ordinary care on the part of the corporation was shown: *King v. Boston and Worcester R. R.*, 9 Id. 112; nor to a laborer employed to repair the road-bed, while being carried to his place of work, by the negligence of those in charge of the train: *Gillshannon v. Stony Brook R. R.*, 10 Id. 228; nor to a carpenter carried over the railroad to repair its fences, bridges, and switch frames, by negligence of the engineer, or of servants whose duty it was to inspect the axles of the cars: *Seaver v. Boston and Maine R. R.*, 14 Gray, 466.

These cases, especially those of Gillshannon and Seaver, cannot be distinguished in principle from the present. In each of those two, as in this, the plaintiff's work did not begin until his arrival at his destination; and in this, as in those, the work was upon the structures, means, or instruments with which the defendants were to carry on their business of common carriers, the workman paid nothing for his passage, and the object of the defendants in carrying him was to get him to his place of work. Risks from the negligence of a switchman, like those from the negligence of the engineer and other servants in charge of the train, must or should have been contemplated by the plaintiff as incident to the employment which he had undertaken. The case of *Russell v. Hudson River R. R.*, 17 N. Y. 134, is to the same effect. And the cases in the House of Lords above cited were actions against a mining company for injuries occasioned to miners, who worked in the mine all day, by the negligence of the man who let them down in the morning and drew them up at night.

The plaintiff was therefore a fellow-servant of the switchman, and not entitled to recover of their common master for any injury occasioned by the negligence of the switchman, or other servant in the same employment.

But it is quite as well settled, both in England and America, that a master is bound to use ordinary care in providing his structures and engines and in selecting his servants, and is liable to any of their fellow-servants for his negligence in this regard: *Tarrant v. Webb*, 18 Com. B. 797; *Bartonshill Coal Co. v. Reid*, 3 Macq. 272, 287, 288; *Ormond v. Holland*, El. B. & E. 102; *Weems v. Mathieson*, 4 Macq. 215; *Clarke v. Holmes*, 7 Hurl. & N. 937, affirming S. C., 6 Id. 349; *Keegan v. Western R. R.*, 8 N. Y. 175 [59 Am. Dec. 476]; *Cayzer v. Taylor*, 10 Gray, 274 [69 Am. Dec. 317]; *Snow v. Housatonic R. R.*, 8 Allen, 441 [85 Am. Dec. 720]. The duty of selecting fit servants belongs to the master, whether the master is an individual or a corporation. The same tests of the liability of masters have been applied to corporations as to individuals in the English decisions above cited, and in our own cases, from Farwell's, in 4 Metcalf, to Snow's, in 8 Allen. To vary the rule in the case of corporations, upon the ground that they must always act by servants or agents, would be to exempt them from liability altogether.

The evidence offered by the plaintiff at the trial was competent to show that the defendants knowingly, or in ignorance caused by their own negligence, employed an habitual drunkard as a switchman, and thereby occasioned the accident. Of the sufficiency of this evidence a jury must judge. If the plaintiff can satisfy them that such misconduct or negligence in the defendants caused the injury, and that he himself used due care, he may maintain his action.

Case to stand for trial. •

BIGELOW, C. J., did not sit in this case.

SERVANT ASSUMES RISK OF EMPLOYMENT: See extended note to *Bussell v. Laconia Mfg. Co.*, 77 Am. Dec. 222, on liability of master for injuries to servant from defective machinery or material, where the subject is discussed and numerous cases cited; *Nashville etc. R. R. Co. v. Elliott*, 78 Id. 506, and note thereto 514; *Mad River etc. R. R. Co. v. Barber*, 67 Id. 312; *Snow v. Housatonic R. R. Co.*, 85 Id. 720, and notes.

WHO ARE FELLOW-SERVANTS IN COMMON EMPLOYMENT: See extended note on the subject to *Fox v. Sandford*, 67 Am. Dec. 588-597.

MASTER'S DUTY TO SUPPLY SUITABLE AND SAFE MACHINERY, APPLIANCES, ETC.: See numerous cases cited in note to *Bussell v. Laconia Mfg. Co.*, 77 Am. Dec. 222; *Nashville etc. R. R. Co. v. Elliott*, 78 Id. 506, and note 514; *Smith v. New York etc. R. R. Co.*, 75 Id. 305; extended note to *Hegeman v. Western R. R. Corp.*, 64 Id. 522, discussing the liability of carriers of passengers for injuries resulting from defects in their vehicles and other appliances. Master must exercise diligence and care in the selection of whatever agencies he employs, whether animate or inanimate; *Noyes v. Smith*, 65 Id. 222; *Snow v. Housatonic R. R. Co.*, 85 Id. 720, and notes.

MASTER'S LIABILITY FOR INJURY TO SERVANT FROM FELLOW-SERVANT'S NEGLIGENCE: See references in end of note to *Buzell v. Laconia Mfg. Co.*, 77 Am. Dec. 225; numerous cases cited in note to *Fox v. Sandford*, 67 Id. 589; *O'Connell v. Baltimore etc. R. R. Co.*, 83 Id. 549, and note 553; *Ryan v. Fowler*, 82 Id. 315, and note 321; *Brackett v. Lubkee*, 81 Id. 694, and note 696; *Nashville etc. R. R. Co. v. Elliott*, 78 Id. 506, and note 514; *Illinois Cent. R. R. Co. v. Cox*, 71 Id. 298; *Mad River etc. R. R. Co. v. Barber*, 67 Id. 312; *Snow v. Housatonic R. R. Co.*, 85 Id. 720, and notes.

RAILROAD COMPANY IS LIABLE FOR INJURY CAUSED BY NEGLIGENCE OF ITS SERVANTS: *Black v. Carrollton R. R. Co.*, 63 Am. Dec. 586, and note 589; *Mad River etc. R. R. Co. v. Barber*, 67 Id. 312; numerous cases cited in note to *Fox v. Sandford*, 67 Id. 589; *Noyes v. Smith*, 65 Id. 222, and note 225, citing numerous cases. Especially does the rule apply to an incompetent fellow-servant who was knowingly or negligently employed by the master: *Cayser v. Taylor*, 69 Id. 317; *Snow v. Housatonic R. R. Co.*, 85 Id. 720, and notes.

NEGLIGENCE — PLAINTIFF MUST PROVE DUE CARE: *Gahagan v. Boston etc. R. R. Co.*, 79 Am. Dec. 724; note to *Johnson v. Hudson River R. R. Co.*, 75 Id. 383; *McCully v. Clarke*, 80 Id. 584, and note 588; *Wilson v. City of Charleston*, 85 Id. 693, and note; *Warren v. Fitchburg R. R. Co.*, 85 Id. 700, and note.

THE PRINCIPAL CASE WAS CITED in each of the following authorities, and to the point stated: The master, whether a natural person or a corporation, is bound to use reasonable care in selecting his servants, and in keeping the engines with which, and the buildings, places, and structures in, upon, or over which, his business is carried on, in a fit and safe condition, and is liable to any of his servants for injuries suffered by them by reason of his negligence in this respect: *Holden v. Fitchburg Railroad*, 129 Mass. 276; *Morse v. Glendon Co.*, 125 Id. 286; *Ford v. Fitchburg R. R. Co.*, 110 Id. 259; *Gilman v. Eastern R. R. Co.*, 13 Allen, 440; *Davis v. Detroit etc. R. R. Co.*, 20 Mich. 124. And he is bound to use such care both in procuring and maintaining such servants, structures, and engines: See case last cited. This duty of the master, too, is so far personal and inalienable that responsibility for damages caused by the negligent discharge of it exists, although the master in discharging it may, for his own convenience, act through other servants: *Dillon v. Union Pacific R. R. Co.*, 3 Dill. 323. The obligation is also imposed upon him of providing a suitable place in which the servant, being himself in the exercise of due care, can perform his duty safely, or at least without exposure to dangers that do not come within the obvious scope of his employment: *Coombs v. New Bedford Cordage Co.*, 102 Mass. 584. Railroad corporation or other master is not, where such master is not in fault, liable for an injury to a servant occasioned by the negligence of a fellow-servant: *Ladd v. New Bedford R. R. Co.*, 119 Id. 412; *Hodgkins v. Eastern R. R. Co.*, 119 Id. 421; *Walker v. Boston and Maine R. R.*, 128 Id. 11. A carpenter employed in a railroad repair-shop is a fellow-servant with a flagman or switchman: *Holden v. Fitchburg R. R. Co.*, 129 Id. 272. A railroad carpenter is a fellow-servant with a railroad superintendent: *Osborne v. Morgan*, 130 Id. 102. A servant assumes the risks incident to his employment: *Gilman v. Eastern R. R. Co.*, 13 Allen, 440. Burden of proof is upon plaintiff to show that servant has become reckless and unfit for his duty since his employment, if such fact is charged: *Davis v. Detroit etc. R. R. Co.*, 20 Mich. 122. The doctrines of the principal case were followed and approved in *Gilman v. Eastern R. R. Co.*, 13 Allen, 440; *Ford v. Fitchburg R. R. Co.*, 110 Mass. 259; *Huddleston v. Lowell Machine Shop*, 106 Id. 284; *Arkerson v. Dennison*, 117 Id. 411.

FARWELL v. MATHER.

[10 ALLEN, 322.]

MEMORANDUM REQUIRED BY STATUTE OF FRAUDS TO MAINTAIN ACTION ON CONTRACT FOR SALE OF ANY INTEREST IN LAND MUST CLEARLY SHOW, either by itself or taken in connection with some other writing contemporaneous with or referred to in the memorandum, what that interest is.

MEMORANDUM REQUIRED BY STATUTE OF FRAUDS MAY BE INTERPRETED BY RESORT TO ORAL EVIDENCE. The court may ascertain by such evidence the relations of the parties to any property which will satisfy the terms of the memorandum, but the writing, whether consisting of one paper or several, must describe or identify the subject of the contract.

MEMORANDUM IN WRITING AGREEING TO GIVE CERTAIN SUM "for the whole property, from cellar to top, including lease, press, boiler and engine, type, fixtures, furniture," etc., and to pay a certain sum quarterly until the principal and interest are paid, and "in addition pay over the \$1,215 to be received from P., and the proceeds and good-will of the Times, all of which sums shall be deducted from" the gross sum to be paid, is not sufficient to take the contract out of the statute of frauds.

SAME. — NO ACTION UPON SUCH CONTRACT CAN BE SUPPORTED BY ADDITION OF ORAL PROOF THAT MEMORANDUM WAS INTENDED TO APPLY TO AN UNEXPIRED LEASE OF A CERTAIN BUILDING, SUBJECT TO A CERTAIN GROUND-RENT, IN WHICH BUILDING THE PRESS AND OTHER ARTICLES WERE SITUATED AND THE TIMES NEWSPAPER WAS PRINTED; THAT P., HAD AGREED AND BARGAINED WITH THE VENDOR, IN CONSIDERATION OF \$1,215, FOR A RELEASE AND CONVEYANCE OF A SMALL PORTION OF THE LAND INCLUDED IN SAID LEASE; AND THAT THERE WAS NO OTHER BUILDING ANYWHERE OWNED OR HELD BY THE VENDOR UNDER A LEASE TO WHICH THE DESCRIPTION WOULD APPLY.

CONTRACT to recover damages for breach of an agreement which read as follows: "We will give you sixteen thousand five hundred dollars for the whole property, from cellar to top, including lease, press, boiler and engine, type, fixtures, furniture, etc., and you are to protect us in the possession of the same from all parties. We will pay as follows: We will pay all ground-rent and taxes, and pay you five hundred dollars quarterly until the principal and interest are all paid; we will, in addition, pay over to you the twelve hundred and fifteen dollars to be received from John C. Pratt, and the proceeds of the press and good-will of the Times, all of which sums shall be deducted from the sixteen thousand five hundred dollars. We to take the property free from all debts, except the above sum, and you to pay all other liabilities up to the time of transferring the same to us, except the ground-rent from April 1, 1857, which we are to pay. J. H. and F. F. Farwell and Forest. I agree to accept the above proposition. O. H. Mather." At the trial the plaintiffs offered to prove that this agreement was made and delivered on April 21, 1857; that it

was intended by the parties to apply to a lease from the owner of the fee of a building on State Street, Boston, which lease belonged to the defendant; that of the term created by the said lease there remained eight years unexpired; that the lease was subject to a ground-rent, reserved by it to the owners of the fee; that in the building so leased there were a printing-press, boiler, engine, type, fixtures, and furniture, and that a newspaper called the Times was printed and published in said building; that Pratt, before making said agreement declared on, had agreed and bargained with the defendant for a release and conveyance of a small portion of the land included in said lease, for which Pratt agreed to pay the sum of \$1,215; that at the time this agreement was made it was contemplated by the plaintiffs and the defendant that the plaintiffs were to sell the good-will of the Times newspaper and the press on which it was printed; and that there was no other building anywhere held or owned by the defendant by virtue of a lease, or in which he had any interest, which contained a press of any description, a boiler or engine, or types, or in which a newspaper called the Times was printed and published, or for any interest in in which Pratt was bound or had agreed to pay the defendant or any one \$1,215. This evidence was offered for the purpose of showing to what property said agreement applied and referred. Plaintiffs also offered to prove that immediately after the execution of the agreement above set forth they and the defendant went to an attorney, and directed him to make the proper conveyances to carry out said agreement; that said conveyances were made and agreed to by both the defendant and the plaintiffs, and in which said lease the Times newspaper, press, boiler and engine, and fixtures were fully described; but that said conveyances were not signed, merely because it was necessary to obtain the date of some paper referred to therein; and that before such date was obtained the defendant refused to perform his agreement and sign and deliver such conveyances. Said conveyances were produced by the plaintiffs and offered in evidence, for the purpose of pointing out and showing to what the agreement sued on applied and had reference. All this testimony was objected to by defendant, who contended that the agreement sued on was insufficient in law to bind him; that it could not be ascertained from the agreement itself what property was to be sold and conveyed; that it was void for uncertainty; that it did not comply with the requisitions of the statute of frauds; and that parol evi-

dence could not be received for any of the purposes for which it was offered. The questions arising on the agreement and on the evidence offered by the plaintiffs were reserved for the consideration of the whole court.

J. G. Abbott, for the plaintiffs.

G. A. Somerby, for the defendant.

By Court, GRAY, J. The memorandum required by the statute of frauds to maintain an action on a contract for the sale of any interest in land must clearly show, either by itself or taken in connection with some other writing contemporaneous with or referred to in the memorandum, what that interest is. The court may, indeed, for the purpose of interpreting the memorandum, put itself in the position of the parties, and ascertain by oral evidence their relations to any property which would satisfy the terms of the memorandum; but seen in the light of these circumstances, the writing, whether consisting of one paper or several, must describe or identify the subject of the contract.

The memorandum on which the plaintiffs rely describes the thing to be bought and sold as "the whole property, from cellar to top, including lease, press, boiler and engine, type, fixtures, furniture," etc. If it is allowable (of which there is some doubt) for the court to refer, when the memorandum does not, to the instrument of lease to the defendant, in order to supply the duration of the lease mentioned in the memorandum, the difficulty still remains that the memorandum is not limited to property owned or held by the defendant, and the words used are certainly not less applicable to the whole estate than to a leasehold interest in it. It is "the whole property, from cellar to top," not "your property," or "your interest in the property," which is to be bought and sold. It is not described as "consisting of," but as "including," the lease, printing-press, fixtures, and furniture. The agreement of Pratt with the defendant, as stated in the plaintiffs' offer of evidence, was "for a release and conveyance of a small portion of the land included in said lease"; but even if Pratt's agreement was confined to a leasehold interest, it does not follow that the property which the defendant agreed to sell to the plaintiff was no greater estate. The stipulations as to payment of "ground-rent" are not expressed with such definiteness as to clear up the ambiguity of the principal words of description. To hold such a memorandum, which does

not show whether it relates to an estate in fee, for life, or for years, sufficient to take the case out of the statute of frauds, would be to practically do away with the statute, and to disregard precedents of the highest authority: *Fitzmaurice v. Bayley*, 9 H. L. Cas. 78; S. C., 8 El. & B. 664; *Clinan v. Cooke*, 1 Schoales & L. 22; *Abeel v. Radcliff*, 13 Johns. 297 [7 Am. Dec. 377]; *Morton v. Dean*, 13 Met. 385; *Waterman v. Meigs*, 4 Cush. 497.

Judgment for the defendant.

MEMORANDUM OF AGREEMENT FOR SALE OF LANDS REQUIRED BY STATUTE OF FRAUDS must state the contract with reasonable certainty, so that the substance of it may be understood from the writing itself, without having recourse to parol proof: *Bailey v. Ogden*, 3 Am. Dec. 509; *Sherburne v. Shaw*, 8 Id. 47; *Meadows v. Meadows*, 15 Id. 645; *Peltier v. Collins*, 20 Id. 711, and note 715; note to *Atwood v. Cobb*, 26 Id. 662; note to *McConnell v. Brillhart*, 65 Id. 668. But the instrument may be made certain by reference to something else, whereby the terms can be ascertained with reasonable precision: *Abeel v. Radcliff*, 7 Id. 377. But latent ambiguities may be explained, and evidence of extrinsic facts will sometimes be admitted to identify the person or thing intended, or the quantity of interest: *McConnell v. Brillhart*, 65 Id. 661.

SWEENEY v. OLD COLONY AND NEWPORT R. R. Co.

[10 ALLEN, 368.]

IN ORDER TO MAINTAIN ACTION FOR INJURY TO PERSON OR PROPERTY BY REASON OF NEGLIGENCE OR WANT OF DUE CARE, there must be shown to exist some obligation or duty towards the plaintiff, which the defendant has left undischarged or unfulfilled. This is the basis on which the cause of action rests.

OWNER OF LAND IS NOT BOUND TO PROTECT OR PROVIDE SAFEGUARDS FOR WRONG-DOERS. So a trespasser or licensee who enters on premises by permission only, without any enticement, allurement, or inducement being held out to him by the owner or occupant, cannot recover damages for injuries caused by obstructions or pitfalls.

OWNER'S LIABILITY FOR INJURIES TO PERSONS COMING ON HIS PREMISES. — A mere passive acquiescence by an owner or occupier in a certain use of his land by others involves no liability; but if he directly or by implication induces persons to enter on and pass over his premises, he thereby assumes an obligation that they are in a safe condition, suitable for such use, and for a breach of this obligation he is liable in damages to a person injured thereby.

RAILROAD COMPANY'S LIABILITY FOR INJURIES TO PERSONS ATTEMPTING TO CROSS ITS TRACK AT PRIVATE CROSSING. — Where a railroad company have made a private crossing over their track, in a city, allowed the public to use it as a highway, and stationed a flagman there to prevent persons from undertaking to cross when there is danger, they are liable in

damages to one who, using due care, is induced to undertake to cross by a signal from the flagman that it is safe, and who is injured by a collision which occurs through the flagman's carelessness. The case comes within that class in which parties have been held liable in damages by reason of having held out an invitation or inducement to persons to enter upon and pass over their premises.

FLAGMAN CHARGED WITH DUTY OF PROTECTING PUBLIC, at a place constructed and used as a public way by great numbers of people, such as a private railroad crossing in a city, is bound to indicate to persons when it is safe for them to pass as well as when it is necessary or prudent for them to refrain from passing.

PARTY'S LIABILITY FOR NEGLIGENCE IN PERFORMANCE OF DUTY VOLUNTARILY ASSUMED, AND NOT IMPOSED BY RULES OF LAW. — If a person undertakes to do an act or discharge a duty by which the conduct of others may properly be regulated and governed, he is bound to perform it in such manner that those who are rightfully led to a course of conduct or action on the faith that the act or duty will be properly performed, shall not suffer loss or injury by reason of his negligence. The liability in such cases does not depend on the motives or considerations which induced a party to take on himself a particular task or duty, but on the question whether the legal rights of others have been violated by the mode in which the charge assumed has been performed.

TORT to recover damages for a personal injury sustained by being run over by the defendants' cars, while the plaintiff was crossing their railroad by license, on a private way leading from South Street to Federal Street, in Boston. This private way, called Lehigh Street, was made by the South Cove Corporation for their own benefit, and they owned the fee of it. It was wrought as a way, and buildings were erected on each side of it, belonging to the owners of the way, and there had been much crossing there by the public for several years. The defendants, having rightfully taken the land under their charter, not subject to any right of way, had made a convenient plank crossing, and kept a flagman at the end of it on South Street, partly to protect their own property, and partly to protect the public. They had never made any objection to such crossing, so far as it did not interfere with their cars and engines. There were several tracks at the crossing. The only right of the public to use the crossing was under the license implied by the facts stated above. The defendants had a car at their depot, on the day of the accident, which they had occasion to run over to their car-house. It was attached to an engine and taken over the crossing to a proper distance beyond the switch. The coupling-pin being taken out, and the engine reversed, it was moved towards the car-house by the side-track. There was a good engineer and fireman on the engine, and a

brakeman on the car. The bell was constantly rung, and the defendants were not guilty of any negligence in respect to the management of the car or engine. As the engine and car were coming from the depot, the plaintiff, with a horse and a wagon loaded with empty beer-barrels, was coming down South Street from the same direction. There was evidence tending to show that as he approached the crossing, the flagman, who was at his post, made a signal to him with his flag to stop, which he did; that in answer to an inquiry by the plaintiff whether he could then cross, he then made another signal with his flag, indicating that it was safe to cross; that the plaintiff started across, looking straight forwards; that he saw the car coming near him as it went towards the car-house; that he jumped forward from his wagon; and that the car knocked him down and ran over and broke both his legs. The car struck the fore-wheel of his wagon, and also his horse. If he had, however, remained in his wagon, or had not jumped forwards, or had kept about the middle of the crossing, he would not, as the evidence showed, have been injured personally. Defendants contended that, even if the plaintiff used ordinary care, and if the flagman carelessly and negligently gave the signal that he might cross, when in fact it was unsafe to do so on account of the approaching car, the plaintiff was not entitled to recover, because the license to people to use the crossing was not a license to use it at the risk of the defendants, but to use it as they best could when not forbidden, taking care of their own safety, and going at their own risk. They also contended that, if the flagman made a signal to the plaintiff that he might cross, he exceeded his authority. As to the care used by the plaintiff and the flagman, the evidence was contradictory, and the judge ruled, for the purpose of taking a verdict upon these two facts, that the defendants had a right to use the crossing as they did on this occasion, and that they were not bound to keep a flagman there; yet, since they did habitually keep one there, they would be responsible to the plaintiff for the injury done to him by the car, provided he used due care, if he was induced to cross by the signal made to him by the flagman, and if that signal was carelessly or negligently made at a time when it was unsafe to cross on account of the movement of the car. A verdict for seven thousand five hundred dollars was returned for the plaintiff, and the case was reserved for the consideration of the whole court.

J. G. Abbott and P. H. Sears, for the defendants.

S. J. Thomas, for the plaintiff.

By Court, BISELOW, C. J. This case has been presented with great care on the part of the learned counsel for the defendants, who have produced before us all the leading authorities bearing on the question of law which was reserved at the trial. We have not found it easy to decide on which side of the line which marks the limit of the defendants' liability for damages caused by the acts of their agents the case at bar falls. But on careful consideration we have been brought to the conclusion that the rulings at the trial were right, and that we cannot set aside the verdict for the plaintiff on the ground that it was based on erroneous instructions in matter of law.

In order to maintain an action for an injury to person or property by reason of negligence or want of due care, there must be shown to exist some obligation or duty towards the plaintiff, which the defendant has left undischarged or unfulfilled. This is the basis on which the cause of action rests. There can be no fault or negligence or breach of duty where there is no act or service or contract which a party is bound to perform or fulfill. All the cases in the books in which a party is sought to be charged on the ground that he has caused a way or other place to be encumbered, or suffered it to be in a dangerous condition, whereby accident and injury have been occasioned to another, turn on the principle that negligence consists in doing or omitting to do an act by which a legal duty or obligation has been violated. Thus a trespasser who comes on the land of another without right cannot maintain an action if he runs against a barrier or falls into an excavation there situated. The owner of the land is not bound to protect or provide safeguards for wrong-doers. So a licensee, who enters on premises by permission only, without any enticement, allurements, or inducement being held out to him by the owner or occupant, cannot recover damages for injuries caused by obstructions or pitfalls. He goes there at his own risk, and enjoys the license subject to its concomitant perils. No duty is imposed by law on the owner or occupant to keep his premises in a suitable condition for those who come there solely for their own convenience or pleasure, and who are not either expressly invited to enter or induced to come upon them by the purpose for which the premises are appropriated and occupied, or by some preparation or adaptation of the place for use by

customers or passengers, which might naturally and reasonably lead them to suppose that they might properly and safely enter thereon.

On the other hand, there are cases where houses or lands are so situated, or their mode of occupation and use is such, that the owner or occupant is not absolved from all care for the safety of those who come on the premises, but where the law imposes on him an obligation or duty to provide for their security against accident and injury. Thus the keeper of a shop or store is bound to provide means of safe ingress and egress to and from his premises for those having occasion to enter thereon, and is liable in damages for any injury which may happen by reason of any negligence in the mode of constructing or managing the place of entrance and exit. So the keeper of an inn or other place of public resort would be liable to an action in favor of a person who suffered an injury in consequence of an obstruction or defect in the way or passage which was held out and used as the common and proper place of access to the premises. The general rule or principle applicable to this class of cases is, that an owner or occupant is bound to keep his premises in a safe and suitable condition for those who come upon and pass over them, using due care, if he has held out any invitation, allurement, or inducement, either express or implied, by which they have been led to enter thereon. A mere naked license or permission to enter or pass over an estate will not create a duty or impose an obligation on the part of the owner or person in possession to provide against the danger of accident. The gist of the liability consists in the fact that the person injured did not act merely for his own convenience and pleasure, and from motives to which no act or sign of the owner or occupant contributed, but that he entered the premises because he was led to believe that they were intended to be used by visitors or passengers, and that such use was not only acquiesced in by the owner or person in possession and control of the premises, but that it was in accordance with the intention and design with which the way or place was adapted and prepared or allowed to be so used. The true distinction is this: A mere passive acquiescence by an owner or occupier in a certain use of his land by others involves no liability; but if he directly or by implication induces persons to enter on and pass over his premises, he thereby assumes an obligation that they are in a safe condition, suitable for such use, and for a breach of this obligation he is liable in damages to a person injured thereby.

This distinction is fully recognized in the most recent and best considered cases in the English courts, and may be deemed to be the pivot on which all cases like the one at bar are made to turn. In *Corby v. Hill*, 4 Com. B., N. S., 556, the owner of land, having a private road for the use of persons coming to his house, gave permission to a builder engaged in erecting a house on the land to place materials on the road; the plaintiff, having occasion to use the road for the purpose of going to the owner's residence, ran against the materials and sustained damage, for which the owner was held liable. Cockburn, C. J., says: "The proprietors of the soil held out an allurements whereby the plaintiff was induced to come on the place in question; they held this road out to all persons having occasion to proceed to the house as the means of access thereto." In *Chapman v. Rothwell*, El. B. & E. 168, the proprietor of a brewery was held liable in damages for injury and loss of life caused by permitting a trap-door to be open without sufficient light or proper safeguards, in a passage-way through which access was had from the street to his office. This decision was put on the ground that the defendant, by holding out the passage-way as the proper mode of approach to his office and brewery, invited the party injured to go there, and was bound to use due care in providing for his safety. This is the point on which the decision turned, as stated by Keating, J., in *Hounsell v. Smyth*, 7 Com. B., N. S., 738. In the last-named case the distinction is clearly drawn between the liability of a person who holds out an inducement or invitation to others to enter on his premises by preparing a way or path by means of which they can gain access to his house or store, or pass into or over the land, and in a case where nothing is shown but a bare license or permission tacitly given to go upon or through an estate, and the responsibility of finding a safe and secure passage is thrown on the passenger, and not on the owner. The same distinction is stated in *Barnes v. Ward*, 9 Com. B. 392; *Hardcastle v. South Yorkshire R'y etc.*, 4 Hurl. & N. 67; and *Binks v. South Yorkshire R'y etc.*, 32 L. J., N. S., Q. B. 26. In the last-cited case the language of Blackburn, J., is peculiarly applicable to the case at bar. He says: "There might be a case where permission to use land as a path may amount to such an inducement as to lead the persons using it to suppose it a highway, and thus induce them to use it as such." See also, for a clear statement of the difference between cases where an invitation or allurements is held out by the defendant, and

those where nothing appears but a mere license or permission to enter on premises, *Balch v. Smith*, 7 Hurl. & N. 741, and *Scott v. London Docks Co.*, 11 L. T., N. S., 383.

The facts disclosed at the trial of the case now before us, carefully weighed and considered, bring it within that class in which parties have been held liable in damages by reason of having held out an invitation or inducement to persons to enter upon and pass over their premises. It cannot, in any just view of the evidence, be said that the defendants were passive only, and gave merely a tacit license or assent to the use of the place in question as a public crossing. On the contrary, the place or crossing was situated between two streets of the city (which are much frequented thoroughfares), and was used by great numbers of people who had occasion to pass from one street to the other, and it was fitted and prepared by the defendants with a convenient plank crossing, such as is usually constructed in highways, where they are crossed by the tracks of a railroad, in order to facilitate the passage of animals and vehicles over the rails. It had been so maintained by the defendants for a number of years. These facts would seem to bring the case within the principle already stated, that the license to use the crossing had been used and enjoyed under such circumstances as to amount to an inducement, held out by the defendants to persons having occasion to pass, to believe that it was a highway, and to use it as such. But the case does not rest on these facts only. The defendants had not only constructed and fitted the crossing in the same manner as if it had been a highway, but they had employed a person to stand there with a flag, and to warn persons who were about to pass over the railroad when it was safe for them to attempt to cross with their vehicles and animals, without interference or collision with the engines and cars of the defendants. And it was also shown that when the plaintiff started to go over the tracks with his wagon, it was in obedience to a signal from this agent of the defendants that there was no obstruction or hindrance to his safe passage over the railroad. These facts well warranted the jury in finding, as they must have done in rendering a verdict for the plaintiff under the instructions of the court, that the defendants induced the plaintiff to cross at the time when he attempted to do so, and met with the injury for which he now seeks compensation.

It was suggested that the person employed by the defendants

to stand near the crossing with a flag exceeded his authority in giving a signal to the plaintiff that it was safe for him to pass over the crossing just previously to the accident, and that no such act was within the scope of his employment, which was limited to the duty of preventing persons from passing at times when it was dangerous to do so. But it seems to us that this is a refinement and distinction which the facts do not justify. It is stated in the report that the flagman was stationed at the place in question, charged, among other things, with the duty of protecting the public. This general statement of the object for which the agent was employed, taken in connection with the fact that he was stationed at a place constructed and used as a public way by great numbers of people, clearly included the duty of indicating to persons when it was safe for them to pass as well as when it was prudent or necessary for them to refrain from passing.

Nor do we think it can be justly said that the flagman in fact held out no inducement to the plaintiff to pass. No express invitation need have been shown. It would have been only necessary for the plaintiff to prove that the agent did some act to indicate that there was no risk of accident in attempting to pass over the crossing. The evidence at the trial was clearly sufficient to show that the agent of the defendants induced the plaintiff to pass, and that he acted in so doing within the scope of the authority conferred on him. The question whether the plaintiff was so induced was distinctly submitted to the jury by the court; nor do we see any reason for supposing that the instructions on this point were misunderstood or misapplied by the jury. If they lacked fullness the defendants should have asked for more explicit instructions. Certainly, the evidence as reported well warranted the finding of the jury on this point.

It was also urged, that if the defendants were held liable in this action, they would be made to suffer by reason of the fact that they had taken precautions to guard against accident at the place in question, which they were not bound to use, and that the case would present the singular aspect of holding a party liable for neglect in the performance of a duty voluntarily assumed, and which was not imposed by the rules of law. But this is by no means an anomaly. If a person undertakes to do an act or discharge a duty by which the conduct of others may properly be regulated and governed, he is bound to perform it in such manner that those

who rightfully are led to a course of conduct or action on the faith that the act or duty will be duly and properly performed shall not suffer loss or injury by reason of his negligence. The liability in such cases does not depend on the motives or considerations which induced a party to take on himself a particular task or duty, but on the question whether the legal rights of others have been violated by the mode in which the charge assumed has been performed.

The court were not requested at the trial to withdraw the case from the jury on the ground that the plaintiff had failed to show he was in the exercise of due care at the time the accident happened. Upon the evidence, as stated in the report, we cannot say, as matter of law, that the plaintiff did not establish this part of his case.

Judgment on the verdict.

After the above decision was rendered, the verdict was set aside by CHAPMAN, J., as against the evidence.

OWNER IS LIABLE FOR INJURIES TO PERSONS COMING ON HIS PREMISES, WHEN: See *Elliott v. Pray*, *post*, p. 653; *Zoebisich v. Tarbell*, *post*, p. 660; and extended note thereto.

OWNER'S LIABILITY IN DAMAGES FOR HIS NEGLIGENCE OCCASIONING INJURY TO TRESPASSER: *Johnson v. Patterson*, 35 Am. Dec. 96, and note 104; note to *Munger v. Tonaucanda R. R. Co.*, 53 Id. 387; *Norris v. Litchfield*, 69 Id. 546, and note 550; *Daley v. Norwich etc. R. R. Co.*, 68 Id. 413, and note 421; *Brown v. Lynn*, 72 Id. 768; *Philadelphia etc. R. R. Co. v. Hummell*, 84 Id. 457, and note thereto. As to right to set traps, spring-guns, or other dangerous implements upon one's premises to protect property or persons, see *Johnson v. Patterson*, 35 Am. Dec. 96, and note 104; *State v. Moore*, 83 Id. 159, and extended note thereto 166, 167, discussing the subject. As to contributory negligence in not looking out for pitfalls, open hatchways, etc., where one treads in dangerous places, see extended note to *Freer v. Cameron*, 55 Id. 672-674.

FAILURE OF FLAGMAN TO GIVE WARNING OF APPROACHING TRAIN AT RAILWAY CROSSING IS NEGLIGENCE: *Milwaukee etc. R. R. Co. v. Hunter*, 78 Am. Dec. 699, and note 706.

THE PRINCIPAL CASE WAS CITED IN EACH OF THE FOLLOWING AUTHORITIES, AND TO THE POINT STATED: If a person allows a dangerous place to exist in premises occupied by him, he will be responsible for injury caused thereby to any other person entering upon the premises by his invitation or procurement, express or implied, and not notified of the danger, if the person injured is in the use of due care: *Coombs v. New Bedford etc. Co.*, 102 Mass. 584; *Carleton v. Franconia etc. Steel Co.*, 99 Id. 217; *Mellen v. Morrill*, 126 Id. 546; *Looney v. McLean*, 129 Id. 36; *Davis v. Central Cong. Society*, 129 Id. 371, 372; *Nave v. Flack*, 90 Ind. 209; *Corrigan v. Union Sugar Refinery*, 98 Mass. 578; *Elliott v. Pray*, 10 Allen, 384; S. C., *post*, p. 653; *Zoebisich v. Tarbell*, 10 Allen, 386; S. C., *post*, p. 660; *Larue v. Farren Hotel Co.*, 116 Mass. 68; *Hargreaves v. Deacon*, 25 Mich. 6. He is liable, because it is negligence in him to

invite a person to enter upon a dangerous place without proper warning: *Mellen v. Morrill*, 126 Mass. 546; *Davis v. Central Cong. Society*, 129 Id. 371. And it makes no difference whether the invitation is actuated only by motives of friendship and Christian charity: *Davis v. Central Cong. Society*, 129 Id. 372. In order to maintain an action for an injury to person or property by reason of negligence or want of due care, there must be shown to exist some obligation or duty towards the plaintiff, which the defendant has left undischarged or unfulfilled. This is the basis on which the cause of action rests: *Minor v. Sharon*, 112 Id. 487. On the other hand, however, a mere naked license or permission to enter or pass over an estate will not create a duty or impose an obligation on the part of the owner to provide against the danger of accident: *Vanderbeck v. Hendry*, 34 N. J. L. 472; *Illinois Cent. R. R. Co. v. Godfrey*, 71 Ill. 507; *Evansville etc. R. R. Co. v. Griffin*, 100 Ind. 225; *Lary v. Cleveland etc. R. R. Co.*, 78 Id. 327; *Pittsburgh etc. R'y Co. v. Bingham*, 29 Ohio St. 368, 372; *Severy v. Nickerson*, 120 Mass. 307. It is thus that intruders and others going over premises without invitation go at their own risk, and enjoy the license subject to its concomitant perils: *Pittsburgh etc. R'y Co. v. Bingham*, 29 Ohio St. 372; *Vanderbeck v. Hendry*, 34 N. J. L. 472. So, too, on the same principle, if one voluntarily takes an exposed position on a railroad train, with no occasion therefor, nor inducement thereto, caused by the managers of the road, except a bare license by non-interference, or express permission of the conductor, he takes upon himself the special risks of that position: *Hickey v. Boston etc. R. R. Co.*, 14 Allen, 433. The plaintiff must therefore show that at the time of the injury he was passing over the way or estate in question by the invitation of the defendant, and not by mere license or permission: *Davis v. Cent. Cong. Society*, 129 Mass. 371. And where no obligation or duty towards the plaintiff exists, the defendant cannot be guilty of violating any duty or obligation towards him: *Johnson v. Boston etc. R. R.*, 125 Id. 79; *Vanderbeck v. Hendry*, 34 N. J. L. 472. Evidence for the plaintiff is admissible to show that at a street crossing of a railroad a signal as to safety was usually given, that he was accustomed to look for such signals, and that at the time of the accident he saw none. This evidence, with other circumstances, is admissible for the purpose not only of showing negligence by the defendant, but also of showing that the plaintiff was free from contributory negligence: *Pittsburgh etc. R'y Co. v. Yundt*, 78 Ind. 377. The principal case was cited in *Reist v. City of Goshen*, 42 Id. 343, to the point that the city was guilty of gross neglect in leaving the bridge open, and in not notifying the public that it was in an unsafe and dangerous condition, and that such gross negligence would render the city liable, although the plaintiff was guilty of slight negligence in driving upon the bridge.

ELLIOTT v. PRAY.

[10 ALLEN, 378.]

OWNER'S LIABILITY TO ONE FALLING THROUGH OPEN TRAP-DOOR ON FORMER'S PREMISES AND INJURING HIMSELF. — Where a store has two entrances, with a trap-door between one of them and the stairs leading to the upper stories, which are verbally leased to a tenant with permission to use such entrance, the owners occupying the lower stories are bound to use the trap-door with reference to the safety of those who have a right to use the entry where it is; and if they are negligent in exercising

suitable and reasonable precautions to guard against accident while the trap-door is open, they are liable in damages to a person having lawful occasion to pass to or from the upper rooms, who, while using due care, falls through the trap-door and sustains an injury.

A IS LIABLE FOR INJURIES TO B OCCASIONED BY FALLING THROUGH OPEN TRAP-DOOR ON A'S PREMISES, where B has been induced to enter for a lawful purpose and under belief that they were in safe condition. Where the owners of the upper stories of a store situated on a public street have let them to a tenant, and an entrance directly in front of the stairs leading to the upper stories is so constructed and is so habitually kept open as to indicate that it is a proper entrance for those who have occasion to use the stairs, and there is a trap-door between it and the stairs, which they negligently and carelessly leave open, they are liable in damages to one who, while using due care, and having lawful occasion to use the stairs, is thereby induced to pass through such entrance, and sustains an injury by falling through the trap-door therein.

TORT to recover damages for a personal injury sustained by the plaintiff in consequence of falling through a trap-door while entering the building of defendants. A photographic view and a plan of the premises were put into the case on the trial, by which it appeared that there were two entrances to the building, one of which was No. 47, and led directly into a room occupied by the defendants for the sale of carpets, and the other, which was called No. 49, though there was no number over the door, led into a passage about nine feet wide and ten feet long, which then, after ascending a few steps, extended about six feet farther, to the foot of the stairs which led to the upper stories of the building. At the foot of the main flight of stairs there was a door opening into the sale-room of the defendants, and in the passage between the entrance and the few first steps there was a trap-door which took up nearly one half of the width of the passage. Plaintiff introduced as a witness G. L. Ide, who testified substantially as follows: That he was a manufacturer of cloaks and mantillas; that he occupied the loft over the sale-room of the defendants for a workshop; that he had hired it of the defendants by a verbal lease, had taken possession on September 1, 1863, about five weeks before the accident occurred, and had continued in possession ever since; that the entrance to the shop was at No. 47; that he directed people there; that he had about one hundred and twenty-five women at work there; that his sale-room was elsewhere; that Miss Warren was his fore-woman; that he did not know whether she had engaged the plaintiff to work for him; that No. 47 was through the sale-room of Pray & Co.; that he was to have a right to hoist up and let down goods

when Pray & Co. were not using their hoisting tackle, through the lower entrance called No. 49; that the defendants had a right to keep it closed, except as stated; that nothing was said to him about a right to pass through that lower entry, No. 49; that he did not know where the general entrance to his room was for girls; that he went one way as often as the other; that when No. 49 was filled with carpets he went by No. 47; that the lower door was sometimes fastened up; that they closed the store Saturday afternoons; that he hired the porter to keep it open if he wanted it; that the lower door was generally open; that two of the three folds of it were generally open, making an opening of from five to seven feet; and that he knew of no notice having been given not to pass that way. On cross-examination he testified that there were batten pieces there; that a tackle and fall were necessarily there; that after passing it one would go up four or five steps and then come to a door which shut off the passage from them; that nothing was said about this place, except as to his using the hoisting apparatus; that he supposed their entrance was at No. 47; that he directed people that way; that he recollected, however, that Mr. Pray, Sr., was opposed to his having the room on account of bringing so many girls through their sale-room; that they used the hoisting way most of the time; that he made no request that they should put up a barrier before the trap-door to protect the passage; and that they had a right to stop the passage when they chose. Plaintiff testified substantially that on the morning of October 7, 1863, she was going into what she supposed to be Ide's shop; that she had been there once before, and some one in Pray's shop pointed it out as the way; that the person appeared to belong there, and went and pointed out the place, and told her to go upstairs, and to go as far as she could go; that the outside door, No. 49, was then open; that she went to call on Miss Holmes, through whom she had made a contract with Miss Warren to work there; that she went down Summer Street, with the sun shining in her eyes, and stepped up from the sidewalk into the passage; that it seemed but one step forward, and she fell; that she saw no one in the entry, or below, in the place where she fell; that there was nothing to warn her of the trap-door; that she was going to her work, and that she did not recollect any obstructions in the entry. Having testified as to her injuries, she said on cross-examination that when she went down the street she had a parasol, but put it down before she got to the regular

entrance of the store; that she mistook the place; that they were not then hoisting goods; that she did not notice rope or hoistway or strips of board or battens; that she looked for obstructions, and should have seen them had there been any; but that she did not look for a hole in the floor. Four of the girls employed by Ide testified that the general and ordinary passage was through No. 49, and that when this was obstructed they went through the store, but almost always could get in at No. 49. One of them said that when she first went there she did not know the way, and inquired of and was directed by a young man at Pray's desk to No. 49. Other evidence was introduced as to the amount of the plaintiff's injury, and it was admitted that the condition of the hoistway at the time of the accident was caused by the defendants' servants. Upon this and other evidence the judge reserved the case, by consent of the parties, for the consideration of the whole court, with an agreement that they might draw any inferences from such of the evidence as was competent that a jury might draw; and that if, upon this evidence and these inferences, a legal cause of action was established, it should be sent to a jury to assess the damages; or if otherwise, that a verdict should be entered for the defendants.

J. G. Abbott and M. Dyer, Jr., for the plaintiff.

S. Bartlett, for the defendants.

By Court, BIGELOW, C. J. We are of opinion that this case is a proper one for the consideration of a jury, not on the question of damages only, but also to determine whether the facts are such as to render the defendants liable in this action. As the case stands on the report, we are not prepared to pronounce a decision in favor of either party. Some of the essential facts involved in the issue are in controversy, and the determination of them depends on a variety of circumstances which cannot be intelligently and satisfactorily considered and applied by the court upon a case reserved. There are cases, and this seems to us to be one of them, the decision of which must turn in part on the credibility of witnesses as indicated by their appearance and mode of testifying, and in part on the proper application of facts to the subject-matter, which render it peculiarly necessary and proper that they should be submitted to the judgment of practical men in order to arrive at correct and safe results. For this reason we do not deem it expedient to exercise the power reserved to the

court by the assent of the parties of determining whether, on the evidence stated in the report, this action can be maintained against the defendants.

Upon a new trial the case will present itself in two aspects. One question will be, whether the right to use the entry or vestibule leading from the street to the stairway by which access was gained to the chambers of the building was included in the verbal lease under which the plaintiff's employer, the witness Ide, occupied the premises as tenant of the defendants. The testimony of this witness on this point, as stated in the report, is exceedingly vague and unsatisfactory. He appears to be an unwilling witness. He does not state distinctly whether the right to enter from the street through the place where the accident happened was included in the demise. All he says on this point is, that in making his contract for a lease, nothing was said between him and the defendants about the right to pass through the lower entry. He does, however, state that the entrance to the shop occupied by him is through the doors of No. 47; that is, through the store on the first story or basement of the building. And yet he also says that he did not know where the general entrance was for the girls in his employment, and that he went as often one way as the other. By the testimony of the other witnesses in the case it appears that the general and ordinary entrance to the upper rooms of the building was through the entry in question, and that the girls employed by Ide were in the constant habit of going to the room where they worked by passing from the street through this entry and thence up the stairway; and that entrance by any other way was an exception to the general usage. It also appears that this practice was well known to the defendants and persons in their employment. In this state of the evidence, taking into consideration the fact that the building was so constructed that access to the chambers was readily gained through the entry in question, which was in fact one of the purposes for which it was designed, we think it was a proper question to be submitted to the jury, whether the right to enter there was not understood by the parties to be included in the verbal demise by the defendants to the tenant of the upper rooms. If this was found in the affirmative, then the rule of law which would govern the case is very plain and simple. The defendants would be bound to use the trap-door there situated with reference to the fact that others had a right to pass and repass

through the entry in going to and from the upper rooms of the building; and if the defendants were guilty of negligence, either by omitting to stop all passing through the entry while the trap-door was open and they were hoisting goods, or by failing to take any other suitable and reasonable precautions to guard against accident, they would be liable in damages to a person having lawful occasion to pass to or from the upper rooms, who, while in the use of due care, sustained injury by reason of their negligence.

There is another view of the evidence on which the plaintiff might be able to satisfy a jury that the defendants ought to be charged in this action. It appears by the testimony given at the trial, and by an inspection of a photographic representation of the premises which has been submitted to us, that the doorway leading to the entry in question is situated in the front line of a large warehouse on Summer Street; that it is closed by a door with three folds; that two of these folds were usually turned aside, so as to make the entrance from five to seven feet wide; that when the door is thus opened a wide staircase is visible, leading to the chambers of the building, and that the entry is about ten feet long from the door to the beginning of the staircase. These facts, if uncontradicted, and if there is nothing in the construction or appearance of the place to control the natural inference from them, would seem to show that the doorway and entry were intended as a proper mode of access to the upper part of the building from the street, and that it was the only direct one, as there was no other entrance except through the warehouse in the lower story; and that the situation and aspect of this part of the premises were such that they were held out by the defendants as a proper and suitable place for those having lawful occasion to go into the chambers or lofts above to enter for the purpose of ascending the stairs. It also appears that the defendants were cognizant of the fact that the entry was in constant daily use by more than one hundred workwomen, who entered and passed over the place where the trap-door is situated in order to ascend the stairs to the upper rooms of the building, where they were employed. This aspect of the case would seem to bring it within the principle of law fully considered and stated in *Sweeny v. Old Colony and Newport Railroad*, 10 Allen, 368 [*ante*, p. 644], whereby a party is held liable in damages to a person injured by a defect or obstruction in a private way or passage into which he has been induced to enter for a lawful purpose by any invitation, allurement, or

enticement, either express or implied, held out to him by the party sought to be charged. Whether there are facts which ought reasonably to repel the inference arising from those to which we have adverted, and to show that no inducement or invitation of any kind was held out to the plaintiff,—such, for example, as the appearance of the entry in question; that it was finished with battens; that chains and ropes were hanging there; and that it was designed for use as a hoisting-place only, and not for passing to and fro,—is a question which can be best determined by practical men on a view of all the facts and circumstances bearing on the issue. Upon this part of the case, the proper instructions in matter of law would be substantially these: The warehouse of the defendants being upon a public street in the city, and being used by persons who had lawful occasion to pass from the street to the upper parts of the building, if the doorway and entry where the injury to the plaintiff happened were so constructed as to appear to afford a proper place for gaining access to the chambers, and they were left open by the defendants in such manner as to be held out to persons having occasion to go into the chambers as a suitable place of entrance thereto, who were thereby induced to enter, the defendants would be liable to any person lawfully passing there under or by reason of such inducement, who was injured in consequence of the carelessness of the servants of the defendants in leaving the trap-door open, whereby such person, using due care, fell and sustained personal injuries.

New trial ordered.

OWNER'S LIABILITY FOR INJURIES TO PERSONS COMING ON HIS PREMISES: See *Sweeney v. Old Colony etc. R. R. Co.*, ante, p. 644, and note thereto; *Zoeblisch v. Tarbell*, post, p. 660, and extended note thereto.

THE PRINCIPAL CASE WAS CITED in each of the following authorities, and to the point stated: If a person allows a dangerous place to exist in premises occupied by him, he will be responsible for injury caused thereby to any other person entering upon the premises by his invitation or procurement, express or implied, and not notified of the danger, if the person injured is in the use of due care: *Coombs v. New Bedford etc. Co.*, 102 Mass. 584; *Carleton v. Franconia etc. Steel Co.*, 99 Id. 217; *Looney v. McLean*, 129 Id. 36. Where a church society has accepted and used a staging, and has invited a painter and his workmen to come upon it to paint the church, it is liable to any of them who suffer injury from the dangerous condition of the staging, which was not apparent to them, and which was caused by negligence in its construction: *Mulchey v. Methodist Religious Society*, 125 Id. 489. As to negligence, see also *Gaynor v. Old Colony etc. R'y Co.*, 100 Id. 215. The principal case was also cited in *Reist v. City of Goshen*, 42 Ind. 343, to the point last stated in the note to *Sweeney v. Old Colony etc. R. R. Co.*, ante, p. 644.

ZOEBSCH v. TARBELL.

[10 ALLEN, 335.]

OWNER OF FACTORY IS NOT LIABLE TO PERSON WHO COMES UPON HIS PREMISES and injures himself by falling through a trap-door in a portion of the factory not open to the public, and intended exclusively for workmen, where the owner has held out no invitation or allurement, express or implied, for him to enter.

TORT to recover damages for a personal injury sustained by the plaintiff in consequence of falling through a trap-door in the defendants' factory. The original plaintiff, Karl Brandt, having died after the action was commenced, it was prosecuted by the plaintiff as administrator of his estate. The defendants were brass-founders and manufacturers of gas-fittings, having a shop on one street and a foundry on another. The front room of the lower story of the foundry was used for brazing and annealing. The principal foundry was back of this, three or four feet lower, and separated by a partition. In the latter room there was a scuttle, used for lowering heavy articles into the cellar and raising them therefrom. The only access from the street door to this room was through the front room. Upon the front door of the building there was a sign with the words, "No admittance." It was agreed that it might be taken as proved, if admissible, that the building was not open to the public, and that directions had been given to the workmen not to admit visitors. The doors had spring locks, and were usually kept closed; but persons coming to the front door on business were generally admitted. Persons who lived in that neighborhood also called occasionally and left orders there for repairs. It did not appear, however, that the inner room was visited at all, except by persons employed there. Karl Brandt's deposition was introduced, in which he testified that he was a manufacturer of plated ware; that on December 7, 1863, he called on the defendants at their foundry building, and saw Eben Tarbell upstairs; that he made inquiry about certain brass castings which he had previously ordered, and Tarbell answered that they must be nearly ready, and sent one of the workmen down into the foundry; that Brandt followed, and went into the foundry, and there examined the castings, and left the foundry alone; that in going towards the door he fell into the scuttle, and was greatly injured; that he could not say that the workman was directed to show him into the foundry when he followed him; but that

nothing was said against his going, and no caution was given to him, or notice of any kind, about the opening. He stated, on cross-examination, that not a word was said to him or by him about his going into the foundry; and it appeared that he had never been in the building before. Assuming these facts to be true, the judge ruled that the plaintiff was not entitled to recover, and directed a verdict for the defendants, which was accordingly rendered. The plaintiff alleged exceptions.

T. F. Currier, for the plaintiff.

A. A. Ranney, for the defendants.

By Court, BIGELOW, C. J. The principles of law on which cases of this nature depend are fully stated in the recent case of *Sweeny v. Old Colony and Newport R. R.*, 10 Allen, 368 [*ante*, p. 644]. We cannot see that the facts proved at the trial furnish any plausible ground for holding the defendants liable. There is no evidence that the plaintiff's intestate entered that part of the premises where the accident happened in consequence of any invitation or inducement, either express or implied, held out by the defendants. On the contrary, he went on his own mere motion to a place where customers or visitors were not accustomed to go, where there was no place prepared for them to pass, and which was designed only for workmen engaged in the business carried on there, and who were familiar with the premises. Nor did he go to the place of the accident with the knowledge or assent of the defendants or their servants. He was at best acting under an implied license only. He therefore took on himself the risk of the perils to which he was exposed in going to places which were not intended or prepared for visitors or strangers.

Exceptions overruled.

OWNER IS LIABLE FOR INJURIES TO PERSONS COMING ON HIS PREMISES, WHEN. — 1. *Scope of Note.* — This note is founded upon *Sweeny v. Old Colony etc. R. R. Co.*, *ante*, p. 644, *Elliott v. Pray*, *ante*, p. 653, and the principal case. Appended to *Godley v. Hagerty*, 59 Id. 733-740, will be found an extended note on the liability of owners of premises defectively constructed or out of repair for injuries resulting therefrom. That note includes the liability of owners of bridges, and liability as between landlord and tenant. Those topics will therefore be omitted in the present note. The liability of landlord and tenant respectively for nuisances or injuries from failure to repair will be found treated in an extended note to *City of Lowell v. Spaulding*, 50 Id. 776-783. The liability of individuals or towns for injuries from excavations at roadside, by reason of failure to maintain fences or guards, is treated in an

extended note to *Spawhawk v. City of Salem*, 79 Id. 702-705. The right to set traps or dangerous implements upon one's premises to protect property or persons is discussed in a somewhat extended note to *State v. Moore*, 83 Id. 166, 167. And the question of contributory negligence in going upon premises is touched upon in the note to *Freer v. Cameron*, 55 Id. 672. So these questions, too, will not be treated in the present note.

2. *General Principles Running through Cases on This Subject.*—If a person allows a dangerous place to exist in premises occupied by him, he will be responsible for injury caused thereby to any other person entering upon the premises by his invitation or procurement, express or implied, and not notified of the danger, if the person injured is in the use of due care. He is liable because it is negligence in him to invite a person to enter upon a dangerous place without proper warning. And it makes no difference that the invitation is actuated only by motives of friendship and Christian charity: *Elliott v. Pray*, ante, p. 653, and cases cited in note thereto; cases cited in notes to *Sweeney v. Old Colony etc. R. R. Co.*, ante, p. 644; *Evansville etc. R. R. Co. v. Griffin*, 100 Ind. 221; *Bennett v. R. R. Co.*, 102 U. S. 577; *Parker v. Portland Pub. Co.*, 69 Me. 173; *Johnston v. Boston etc. R. R.*, 125 Mass. 75; *Mulhey v. Methodist etc. Society*, 125 Id. 487; *Looney v. McLean*, 129 Id. 33; *Lary v. Cleveland etc. R. R. Co.*, 78 Ind. 323; S. C., 41 Am. Rep. 572. It is the duty of the owners of property to keep it in such a condition that persons who are lawfully on the premises shall not be injured: *Baker v. Byrne*, 58 Barb. 438; cited in *Godley v. Hagerty*, 20 Pa. St. 387; S. C., 59 Am. Dec. 731, and note 734; *Matheny v. Wolffs*, 2 Duvall, 137; *Earle v. Hall*, 2 Met. 353; *Anderson v. Dickie*, 26 How. Pr. 105; *Beardsley v. Swann*, 4 McLean, 333. On the other hand, however, a mere naked license or permission to enter or pass over an estate will not create a duty or impose an obligation on the part of the owner to provide against the danger of accident. It is thus that intruders and others going over or upon premises without invitation go at their own risk, and enjoy the license subject to its concomitant perils: See numerous cases cited in notes to *Sweeney v. Old Colony etc. R. R. Co.*, ante, p. 644; *Godley v. Hagerty*, 59 Am. Dec. 737; *Parker v. Portland Pub. Co.*, 69 Me. 173; *Union Stock Yards etc. Co. v. Rourke*, 10 Ill. App. 474; *Coppner v. Pennsylvania Co.*, 12 Id. 600. These principles will now be applied to the following cases.

3. *Buildings, Duty of Owner in Erecting—Unfinished Buildings.*—The owner of real estate is liable for the negligent acts of persons in making erections upon it for his benefit, though the relation of master and servant does not exist. And if a dilapidated house by the roadside actually falls upon a passer-by and injures him, the owner or occupier of the house is answerable for the damage occasioned thereby: *Mayor etc. v. Bailey*, 2 Denio, 433, 445; note to *Godley v. Hagerty*, 59 Am. Dec. 735, 736. It is the duty of the owner or occupant of a building to maintain it in such a condition that those persons whom he invites there shall not be injured by any defect in the building: *Homer v. Everett*, 15 Jones & S. 298. But where a party is engaged in erecting a house upon his own ground, he is not, nor are his workmen, bound to put up temporary partitions about stairways, nor floors across beams, nor use other means for the protection of intruders who voluntarily enter the unfinished house and venture to walk across the beams or around its well-holes: *Roulston v. Clark*, 3 E. D. Smith, 366. Where the owner of lots of ground, upon the rear of which are buildings occupied by his tenants, opens a way which they use for their ingress and egress through an adjoining lot while he is improving the front of the lots by putting up buildings, their visitors have no such license, as visitors, that they can aver a right to pass through the unfin-

ished buildings. And in such a case, when the buildings in front are inclosed, and new alley-ways, which the tenants in the rear begin to use, are arranged along the walls, an obstruction of such alley-ways does not give either the tenants or their visitors a right to pass through the houses. So where the father of two of the tenants, wishing to visit his daughters in the night-time, and finding the alleys along the new houses obstructed, attempted to grope his way through the basement hall and fell down into the cellar, it was held that he had acted at his peril, and could maintain no action founded upon the negligence of the mechanics employed in the erection for the injury received: *Roulston v. Clark*, 3 E. D. Smith, 366. The plaintiff, a custom-house officer, had been in the habit of making use of a building in the course of erection, which was left open at both ends, to obtain access from the street on one side to certain bonded vaults on the other, which it was his duty to superintend; the defendant was a subcontractor for the pavement and other stone-work on the passages of the building; the plaintiff, in passing through, fell down an opening and was injured; and the regular mode of access to the vault was not through the passage, but through a gate-way from the street;—upon these facts it was held that no obligation lay upon the defendant to guard the plaintiff from such an accident; that if any license could be inferred to have been given, it was, the building being unfinished, subject to the obvious risks incident to the building: *Castle v. Parker*, 18 L. T., N. S., 367.

4. *Approaches to Buildings—Vaults, Cellars, Hatch-holes, and Drive-ways into Warehouses.*—If private warehousemen, merchants, blacksmiths, millers, or other persons engaged in business construct approaches to their places of business, knowing the same to be defective, or have trap-doors known to be unsafe, where their customers must necessarily pass, and such defects are concealed or not apparent, it seems they will be liable for any injury resulting therefrom: *Buckingham v. Fisher*, 70 Ill. 121; *Parker v. Portland Pub. Co.*, 69 Me. 173; *Nave v. Flack*, 90 Ind. 205. But unless a person is under some public duty to repair a way, even though to his place of business, he will not be liable on failing to do so for an injury caused thereby to others: Id. Where an area on a sidewalk is not properly protected, so that a foot-passenger falls into it and is injured, the owner of the premises is liable: *McIlvaine v. Wood*, 2 Handy, 166. The owner of a building which has a store therein does not, by letting the store, become exempt from liability for damages to persons having lawful occasion to use said store, caused by an opening in the sidewalk in front of the store, which was left there in the original construction of the building, if he is otherwise liable: *Larue v. Farren Hotel Co.*, 116 Mass. 67. The fact that a person noticed on entering a building that there was ice and snow on a plank sidewalk in front of the door is not conclusive evidence, in an action by him against the owner of the building for an injury sustained on his way out of the building, in consequence of such snow and ice, that he was not in the exercise of due care in attempting to pass over the sidewalk: *Devire v. Bailey*, 131 Id. 169. Under a city ordinance allowing an extension of vaults under sidewalks, provided they are kept covered, one who extends his vault and leaves it uncovered is answerable to one falling into it while using due care: *Beardsley v. Swann*, 4 McLean, 333. Cellar doors opening out on the sidewalk, if frequently and negligently kept or left open, endanger the use of such sidewalk in the night, and to persons of imperfect vision by day, and the city is liable to suit by persons falling into said cellars and injured thereby, if it has notice of such negligent use of the cellars: *Chapman v. Mayor etc. of Macon*, 55 Ga. 566. But whether the use of cellar doors, in opening them and leaving them

open, has been proper and legitimate for the owner's use, or capricious and unnecessary, and if legitimate, whether habitually used so negligently as to endanger passers-by, are questions for the jury: *Id.* A dealer in grain had a warehouse for the storage thereof, with a drive-way thereto and therein, by which his customers might reach a place for discharging grain into such warehouse; this drive-way was a passage so dark that defects could not be seen, and was negligently kept in a dangerous condition; the plaintiff was ignorant thereof, and having sold to the defendant a load of grain, attempted to obey the defendant's direction to pass with a team along the way, and on account of an elevation allowed to be negligently raised on the floorway, and which brought the floor and ceiling nearer together, was, without his fault, caught between the timbers of the ceiling of the warehouse and drive-way and seriously injured. Defendant was held answerable. It was held, too, that if the way was really dangerous, the fact that many others had used it without injury was immaterial: *Nave v. Flack*, 90 Ind. 205. Where the owner constructs a vault under and opening into a highway in front of his premises, and covered only by a movable grating without fastenings, he is liable for injury sustained by one falling into the opening: *Anderson v. Dickie*, 1 Rob. (N. Y.) 238; S. C., 26 How. Pr. 105. So where one is awaiting in the night-time the landing of a boat, with the intention of prosecuting his journey, and being unaware of the existence of openings or hatch-holes in the depot floor, and using due care, falls through one of the hatch-holes, and injures himself, he may recover therefor, where the hatch-hole has been negligently left uncovered, unguarded, and unlighted: *Bennett v. R. R. Co.*, 102 U. S. 577. In *McKee v. Bidwell*, 74 Pa. St. 218, the plaintiff, in going about night-fall into defendant's building on business, fell through an opening into the cellar; and it was held that evidence that the defendant afterwards put a light at the opening was admissible on the question of defendant's negligence. The owner of a building leased to a tenant who occupies it is not liable to one who, in passing along a walk leading from the street to the building, for the purpose of transacting business with the tenant, is injured by falling down an embankment adjoining the walk, although the estate was in that condition prior to the letting: *Mellen v. Morrill*, 126 Mass. 545. Where a religious society gives notice of a meeting to be held at its house of worship, and invites the members of other societies to attend, a member of a church so invited, while on the land of the society, is not a mere licensee, and can maintain an action against the society for a personal injury sustained, while in the exercise of due care, from the dangerous condition of the defendant's premises: *Davis v. Central Cong. Society etc.*, 129 Id. 367; S. C., 37 Am. Rep. 368. Ordinary care and diligence must be used to keep business places, and the usual passage-way to them, safe for the access of all persons coming to them at all reasonable hours, by the occupant's invitation, express or implied, or for any purpose beneficial to them: *Parker v. Portland Pub. Co.*, 69 Me. 173. For other cases on this subdivision, see note to *Godley v. Hagerty*, 59 Am. Dec. 734, 735.

5. *Stairways, Trap-doors, Fire-escapes, Holes in Floor, Hatchways, etc.*: See note to *Godley v. Hagerty*, 59 Am. Dec. 734; *Elliott v. Pray*, *ante*, p. 653. In *Freer v. Cameron*, 4 Rich. 228, an action on the case was sustained against the defendants, who were store-keepers, by a plaintiff, who, being in the store as a customer, was invited by the clerk to walk into a dark part of the store, in which there was an open trap-door, through which plaintiff, without negligence on her part, fell and fractured her arm. In an action for damages for personal injuries received by the plaintiff from falling through an un-

guarded and unlighted opening in the floor into the cellar of the defendants' building, where the evidence shows the existence of the hole, which was only partially guarded by a rope attached to posts, and also shows that the plaintiff was not an intruder or trespasser, but was there with the consent of the defendants, it seems that it would be erroneous to dismiss the complaint for failure of proof, and that the question of negligence should be submitted to the jury, even though it was not proved that the defendants had actual notice that the hole was unguarded, it being their duty, when they suffered persons to go over the building, to securely and properly guard such a pitfall: *Dunn v. Durant*, 9 Daily, 389. In an action for damages, where plaintiff's evidence shows that the deceased was found dead in a cellar-way of defendant, such as are common in the streets of large cities, the same opening upon a street with which deceased was familiar, there arises no presumption of negligence on defendant's part of causing the injury, and it is error to refuse an instruction in the nature of a demurrer to the evidence. There is a presumption of negligence on the part of the deceased, especially where it appears that the cellar-way was not peculiarly dangerous, and that the locality was well lighted. Those walking in large cities are bound to take notice of the existence of such constructions as the necessities of commerce and the convenient occupation of residences render common, and if injured by them must blame themselves: *Buesching v. St. Louis Gas Light Co.*, 6 Mo. App. 85.

6. *Elevators.* — Where there is an elevator in the hallway of premises used by different tenants in common, which is inclosed, and has doors opening into the hallway on the first floor, upon which doors there are bolts for the purpose of fastening them, and a servant of a third person, lawfully on the premises, delivering goods to one of the tenants of the upper floors, mistakes the elevator for the stairs and walks into it, and falls through the aperture to the ground-floor, and receives injuries which result in his death, it will be held, in an action brought by his administratrix, that, as the elevator was properly constructed and properly protected, the tenants on one floor are not liable for the negligent manner of use of the hatchway by the tenants on one of the other floors; and there being no affirmative proof showing specific acts of negligence on the part of any particular tenant, neither of the several tenants is liable, either severally or jointly with the others, for injuries resulting from such accidents: *Donnelly v. Jenkins*, 58 How. Pr. 252; S. C., 9 Daly, 41. Where the plaintiff fell down an elevator opening, and brought suit against the defendant, one of two occupants of the building, and at whose invitation the plaintiff was rightfully there, and it could not be shown that the defendant had used the elevator last, it was held that no presumption of negligence could be raised against the defendant; and there being no proof of any, the plaintiff's action could not be sustained: *Harris v. Perry*, 89 N. Y. 308; reversing S. C., 23 Hun, 244. Where one was charged with negligence, in not sufficiently lighting the hall and passage-way to his place of business, and in leaving open the doors to his elevator-way, evidence embracing a period of two years tending to show at different times the condition of the hall and the entrance way as to light, whether more or less or none, the position of the elevator gates and doors, what had happened to others at different times, and their escape from peril, was held to be inadmissible: *Parker v. Portland Pub. Co.*, 69 Me. 173.

7. *Dangerous Machinery on One's Premises.* — The owner of dangerous machinery, who leaves it in an open place, though on his own land, where he has reason to believe that young children will be attracted to play with it

and be injured, is bound to use reasonable care to protect such children from the danger to which they are thus exposed: *Keffe v. Milwaukee etc. Ry Co.*, 21 Minn. 207. It is negligence for the owner to leave such machinery in motion unguarded and so exposed that children playing near by might be expected to be drawn to it by curiosity and injured; and it has been thus held with respect to an elevator in a coal-yard, worked by steam: *Mullaney v. Spence*, 15 Abb. Pr., N. S., 319. So where an owner of a mill left his shafting projecting through the wall, with cog-wheels upon it entirely uncovered, within two feet of the ground, and in an open space near the street, so that a child at play was drawn between the wheels and injured, he is liable: *Whirley v. Whiteman*, 1 Head, 610. One who is exercising a public trade or business which requires the use of a steam-engine is responsible for any injury to another coming on his premises, and which is the consequence of its insufficiency; as where the boiler bursts, and kills man or beast: *Spencer v. Campbell*, 9 Watts & S. 32; compare *Knight v. Goodyear's Indu Rubber etc. Co.*, 38 Conn. 438; *Parks v. Union W. Co.*, 42 Id. 399, concerning the use of steam-whistles by factories, and injuries caused thereby in frightening horses.

8. *Falling of Building, Wall, Platform, or Cornice*: See *Godley v. Hagerty*, 59 Am. Dec. 731, and cases cited in note thereto 733-737. Individuals who hold a fair, and erect structures for the use of their patrons, are liable for any injury such patrons may receive by the breaking down or falling of such structures, if caused by the negligent or unskillful manner of their construction, and their liability cannot, in any manner, be affected by their giving to such fair the name of an old society: *Latham v. Roach*, 72 Ill. 179. But where an action is brought to recover damages on account of injury done by the accidental falling of a structure, proof that there was no fault or negligence imputable to the defendant, and that there was no original imperfection in the structure, is sufficient to avoid liability on his part: *Burton v. Davis*, 15 La. Ann. 448. But if negligence and want of skill in an erection are averred and proved, the plaintiff may recover: *Seabrook v. Hecker*, 2 Robt. 291.

9. *Excavations, Especially Those near Highways*. — In *Howland v. Vincent*, 10 Met. 371, it was held that an owner of land excavating therein within a foot or two of the public street, and using no precaution against the danger of falling into it, was not liable to one who, passing in the night-time, went over the line of the street, fell into the excavation, and was injured. But in *Sanders v. Reister*, 1 Dakota, 151, and *Matheny v. Wolfe*, 2 Duvall, 137, an owner who runs a deep and dangerous excavation up to or near to a sidewalk or pavement in a populous city, and fails to keep it guarded, barricaded, or lighted, is held liable for an injury to one occasioned by falling into it while passing along the highway. One who owns land in a populous neighborhood is bound to use reasonable care not to leave exposed upon his premises any dangerous agency attractive to children; as where persons are excavating sand in a neighborhood where there are many small children, they are bound to take measures to keep them away: *Fink v. Missouri Furnace Co.*, 10 Mo. App. 61.

10. *Dangerous Well-holes in Land*: See "Trespassers and Licensees," *infra*. The owner of premises is liable to one who, being lawfully on the premises, sustains an injury from falling into a well-hole therein, which has been negligently left uncovered, not plainly and palpably visible, and to which the owner called no attention: *Homer v. Everett*, 15 Jones & S. 298. An owner leaving such pitfalls uncovered, and exposing persons and property to danger, is liable to an action for loss accruing to persons or property, not unlawfully

on his premises, for his negligence: *Young v. Harvey*, 16 Ind. 314; *Caulkins v. Mathews*, 5 Kan. 191.

11. *Trespassers and Licensees*: See note to *Godley v. Hagerty*, 59 Am. Dec. 736, 737. A mere permission to pass over one's property, where dangers are likely to be encountered, or an acquiescence in such passage for the benefit or convenience of the licensee, creates no duty on the party giving such permission, except to refrain from acts willfully injurious. One who enjoys such permission is only relieved from being a trespasser, and must assume all the ordinary risk attached to the nature of the place or the business carried on: *Vanderbeck v. Hendry*, 34 N. J. L. 467; *Evansville etc. R. R. Co. v. Griffin*, 100 Ind. 221, where one in crossing another's premises fell into a deep well; *Parker v. Portland Pub. Co.*, 69 Me. 173. And one is not liable to a trespasser who comes on his premises and receives injuries: *Hargreaves v. Deacon*, 25 Mich. 1. The rule is, that the owner of private grounds is under no obligation to keep them in a safe condition for the benefit of idlers, bare licensees, intruders, trespassers, or others, who come upon them, not by any invitation, either express or implied, but for their own convenience or pleasure: *Union Stock Yards v. Rowke*, 10 Ill. App. 474; *Coppner v. Pennsylvania Co.*, 12 Id. 600. Thus, one who goes upon a railroad track without any inducement being held out to him, not at a crossing, and where he has no right to be, is a wrong-doer and trespasser. And if he is injured while so crossing or traveling upon it, the company is not answerable to him: See note to *Little Schuykill etc. Co. v. Norton*, 64 Am. Dec. 675; *Illinois Cent. R. R. Co. v. Godfrey*, 71 Ill. 500; *Johnson v. Boston etc. R. R.*, 125 Mass. 75; *Wright v. Boston etc. R. R.*, 129 Id. 440. So, where a mere intruder went upon the uninclosed premises of a railroad company, and into a building thereon in a state of decay, and while there a sudden storm blew a fragment of the dilapidated building against him and injured him severely, it was held that the company were not answerable. The place had been once used as a freight-house, but had long since been abandoned as a place of public business: *Lary v. Cleveland etc. R. R. Co.*, 78 Ind. 323; S. C., 41 Am. Rep. 572. So, where a long-shoreman, after loading ice on a vessel, went thereon after finishing his work, merely to gratify his curiosity, and there fell down an open hatchway and broke his leg, it was held that he was a mere intruder and remediless: *Severy v. Nickerson*, 120 Mass. 306. As to whether a child may be a trespasser, the cases are not uniform. In *Gillespie v. McGowen*, 100 Pa. St. 144, S. C., 45 Am. Rep. 365, it was held that a child between seven and eight years of age might be a trespasser, and subject to the rules of law relating to trespassers. But in *Coppner v. Pennsylvania Co.*, 12 Ill. App. 600, the owners of private grounds were held liable for injuries to children although trespassing at the time, where from the peculiar nature and exposed position of the dangerous defect or agent, the owner should reasonably have anticipated such injury to flow therefrom as actually happened. In *Mullaney v. Spence*, 15 Abb. Pr., N. S., 319, the question of fault on the part of the child was submitted to the jury. One entering the premises of another, even by invitation, is himself bound to exercise ordinary care and diligence, or he cannot recover if he suffers injury: *Parker v. Portland Pub. Co.*, 69 Me. 173; compare *Callahan v. Warne*, 40 Mo. 131.

FROST v. GRAND TRUNK RAILROAD COMPANY.

[10 ALLEN, 237.]

LIABILITY OF RAILROAD COMPANY FOR INJURY TO PASSENGER AT PLACE WHICH IT IS NOT BOUND TO KEEP IN REPAIR. — Where a railroad train is stopped on a dark night, merely waiting for a train from the opposite direction to pass, at a place several rods from a passenger station, and no notice is given by the servants of the company to passengers that they may leave the cars, one who leaves the cars and receives a personal injury by walking into an open cattle-guard cannot recover damages of the company therefor; and it makes no difference that he was misinformed by some individual not in the company's employment that he must go and see to having his baggage passed at the custom-house, supposed to have been reached by the train, or that the train was near a passenger station which was not the place of his destination.

TORT to recover damages for a personal injury sustained by the plaintiff, caused by his stepping into an open culvert or cattle-guard, maintained by the defendants near a passenger station upon their railroad in Canada. Plaintiff was a passenger upon one of defendants' trains running from Portland to Quebec. The train stopped one dark night near Boundary Line station in Canada, which was a regular passenger station, waiting for a train from the north to pass. It had been waiting for half an hour, and the passengers had been walking about, in and out. The engine had passed about fifty feet beyond the station. No passengers, however, were to be received or discharged at that station, and the conductor did not announce it. The plaintiff was told by some one, whom he took to be the conductor, that he must go and look to his baggage so as to have it passed at the custom-house. This person, however, was not the conductor, and the custom-house was at a station nine miles distant. The plaintiff got out on the side towards the station, crossed the track, walked some eight or ten steps towards the station, and fell into a cattle-guard, which extended across both tracks of the railroad. This cattle-guard was not provided with any means for crossing it, was open, and not lighted. The only light outside was a lantern on the platform of the station, more than one hundred feet distant. It appeared that other accidents had happened there before, and that the defendants had knowledge thereof. Judgment for defendants, and plaintiff appealed.

J. Nickerson, for the plaintiff.

G. O. Shattuck, for the defendants.

By Court, BIGELOW, C. J. The defendants do not appear to have been guilty of any breach of obligation or duty towards the plaintiff. The station in the vicinity of which the accident happened was not the one to which the plaintiff was destined and the defendants had agreed to carry him; they were not bound, therefore, to provide means for his safe egress from the cars and approach to the station; nor was the cattle-guard so near the place at which passengers might reasonably alight from the cars for any purpose as to impose on the defendants the duty of making it suitable and safe for persons to pass and repass over it. The facts show that it was more than one hundred feet distant from the platform of the building at the station. Nor does it appear that there was any act or thing done by the defendants' servants to induce the plaintiff to go to the place where he sustained injury. If there was any negligence or carelessness shown to exist at the time and place of the accident, it was on the part of the plaintiff, who, in a dark night, in a strange place, at a distance of several rods from a passenger station, and without sufficient reason or any inquiry of any person who could give him needful information, alighted from the cars and walked to a place which was not intended for passengers, and which the defendants were not bound to keep in a safe and convenient condition for their use.

Judgment for the defendants.

COMMONWEALTH v. CROTTY.

[10 ALLEN, 408.]

NAME OR SOME DESCRIPTION OF PARTY TO BE ARRESTED ON WARRANT MUST BE EXPRESSED THEREIN. Warrant granted with the name in blank, and without other designation of the person to be arrested, is void.

WHERE PARTY WHOSE NAME IS UNKNOWN IS TO BE ARRESTED, WARRANT MUST CONTAIN the best description possible of the person to be arrested; and it must be sufficient to indicate clearly on whom it is to be served, by stating his occupation, his personal appearance and peculiarities, the place of his residence, or other circumstances by which he can be identified.

OFFICER SEEKING TO SERVE VOID WARRANT BECOMES TRESPASSER; so with any other person.

WARRANT TO ARREST "JOHN DOE OR RICHARD ROE, WHOSE OTHER OR TRUE NAME IS UNKNOWN," without any further description or means of identification of the person to be arrested, is void.

FROST v. GRAND TRUNK RAILROAD COMPANY.

[10 ALLEN, 337.]

LIABILITY OF RAILROAD COMPANY FOR INJURY TO PASSENGER AT PLACE WHICH IT IS NOT BOUND TO KEEP IN REPAIR. — Where a railroad train is stopped on a dark night, merely waiting for a train from the opposite direction to pass, at a place several rods from a passenger station, and no notice is given by the servants of the company to passengers that they may leave the cars, one who leaves the cars and receives a personal injury by walking into an open cattle-guard cannot recover damages of the company therefor; and it makes no difference that he was misinformed by some individual not in the company's employment that he must go and see to having his baggage passed at the custom-house, supposed to have been reached by the train, or that the train was near a passenger station which was not the place of his destination.

TORT to recover damages for a personal injury sustained by the plaintiff, caused by his stepping into an open culvert or cattle-guard, maintained by the defendants near a passenger station upon their railroad in Canada. Plaintiff was a passenger upon one of defendants' trains running from Portland to Quebec. The train stopped one dark night near Boundary Line station in Canada, which was a regular passenger station, waiting for a train from the north to pass. It had been waiting for half an hour, and the passengers had been walking about, in and out. The engine had passed about fifty feet beyond the station. No passengers, however, were to be received or discharged at that station, and the conductor did not announce it. The plaintiff was told by some one, whom he took to be the conductor, that he must go and look to his baggage so as to have it passed at the custom-house. This person, however, was not the conductor, and the custom-house was at a station nine miles distant. The plaintiff got out on the side towards the station; crossed the track, walked some eight or ten steps towards the station, and fell into a cattle-guard, which extended across both tracks of the railroad. This cattle-guard was not provided with any means for crossing it, was open, and not lighted. The only light outside was a lantern on the platform of the station, more than one hundred feet distant. It appeared that other accidents had happened there before, and that the defendants had knowledge thereof. Judgment for defendants, and plaintiff appealed.

J. Nickerson, for the plaintiff.

G. O. Shattuck, for the defendants.

By Court, BIGELOW, C. J. The defendants do not appear to have been guilty of any breach of obligation or duty towards the plaintiff. The station in the vicinity of which the accident happened was not the one to which the plaintiff was destined and the defendants had agreed to carry him; they were not bound, therefore, to provide means for his safe egress from the cars and approach to the station; nor was the cattle-guard so near the place at which passengers might reasonably alight from the cars for any purpose as to impose on the defendants the duty of making it suitable and safe for persons to pass and repass over it. The facts show that it was more than one hundred feet distant from the platform of the building at the station. Nor does it appear that there was any act or thing done by the defendants' servants to induce the plaintiff to go to the place where he sustained injury. If there was any negligence or carelessness shown to exist at the time and place of the accident, it was on the part of the plaintiff, who, in a dark night, in a strange place, at a distance of several rods from a passenger station, and without sufficient reason or any inquiry of any person who could give him needful information, alighted from the cars and walked to a place which was not intended for passengers, and which the defendants were not bound to keep in a safe and convenient condition for their use.

Judgment for the defendants.

COMMONWEALTH v. CROTTY.

[10 ALLEN, 403.]

NAME OR SOME DESCRIPTION OF PARTY TO BE ARRESTED ON WARRANT MUST BE EXPRESSED THEREIN. Warrant granted with the name in blank, and without other designation of the person to be arrested, is void.

WHERE PARTY WHOSE NAME IS UNKNOWN IS TO BE ARRESTED, WARRANT MUST CONTAIN the best description possible of the person to be arrested; and it must be sufficient to indicate clearly on whom it is to be served, by stating his occupation, his personal appearance and peculiarities, the place of his residence, or other circumstances by which he can be identified.

OFFICER SEEKING TO SERVE VOID WARRANT BECOMES TRESPASSER; so with any other person.

WARRANT TO ARREST "JOHN DOE OR RICHARD ROE, WHOSE OTHER OR TRUE NAME IS UNKNOWN," without any further description or means of identification of the person to be arrested, is void.

PERSON SOUGHT TO BE ARRESTED UPON VOID WARRANT MAY LAWFULLY RESIST; and third persons may lawfully aid him in such resistance, using no more force than is necessary to prevent the arrest without being guilty of a riot.

INDICTMENT for a riot. Calvin Peaslee had made a complaint to the police court of Lee, charging that "John Doe or Richard Roe, whose other or true name is to your complainant unknown," had committed an assault and battery upon him. Upon this complaint, a warrant, which was attached to the complaint, was issued against "John Doe or Richard Roe, whose other or true name is to your complainant unknown, named in the foregoing complaint." Neither the complaint nor the warrant contained any further description or means of identification of the person to be arrested. Upon this warrant, a deputy sheriff, with assistants, proceeded to arrest Morris Crotty, one of the defendants in this case, as the real person chargeable. Crotty resisted the arrest, on the ground that the warrant was invalid, and the other defendants aided him. The officer testified that he did not rely upon any description in the warrant, but upon information otherwise obtained, for the identification of Crotty. These were the grounds upon which the district attorney relied. A verdict of guilty was returned against some of the defendants, and they alleged exceptions.

M. Wilcox and I. Sumner, for the defendants.

J. C. Davis, for the commonwealth.

By Court, BIGELOW, C. J. We cannot entertain a doubt that the warrant on which the officer attempted to arrest one of the defendants at the time of the alleged riot was insufficient, illegal, and void. It did not contain the name of the defendant, nor any description or designation by which he could be known and identified as the person against whom it was issued. It was in effect a general warrant upon which any other individual might as well have been arrested, as being included in the description, as the defendant himself. Such a warrant was contrary to elementary principles, and in direct violation of the constitutional right of the citizen, as set forth in the Declaration of Rights, art. 14, which declares that every subject has a right to be secure from all unreasonable searches and seizures of his person, and that all warrants therefore are contrary to this right if the order in the warrant to a civil officer to arrest one or more suspected persons or to seize their

property be not accompanied with a special designation of the persons or objects of search, arrest, or seizure. This is in fact only a declaration of an ancient common-law right. It was always necessary to express the name or give some description of a party to be arrested on a warrant; and if one was granted with the name in blank, and without other designation of the person to be arrested, it was void: 1 Hale P. C. 577; 2 Id. 119; Fost. 312; 7 Dane Abr. 248; 1 Chitty's Crim. Law, 39; *Mead v. Haws*, 7 Cow. 332, and cases cited.

This rule or principle does not prevent the issue and service of a warrant against a party whose name is unknown. In such case the best description possible of the person to be arrested is to be given in the warrant; but it must be sufficient to indicate clearly on whom it is to be served, by stating his occupation, his personal appearance and peculiarities, the place of his residence, or other circumstances by which he can be identified: 1 Chitty's Crim. Law, 39, 40.

The warrant being defective and void on its face, the officer had no right to arrest the person on whom he attempted to serve it. He acted without warrant, and was a trespasser. The defendant whom he sought to arrest had a right to resist by force, using no more than was necessary to resist the unlawful acts of the officer. An officer who acts under a void precept and a person doing the same act who is not an officer stand on the same footing: *Shadgett v. Clipson*, 8 East, 328; *Rex v. Hood*, 1 Moody C. C. 281; *Hoye v. Bush*, 2 Scott N. R. 86; *Pearce v. Atwood*, 13 Mass. 324, 344; *Sanford v. Nichols*, 13 Id. 286 [7 Am. Dec. 151]; *Commonwealth v. Kennard*, 8 Pick. 133; and any third person may lawfully interfere to prevent an arrest under a void warrant, doing no more than is necessary for that purpose: 1 Chitty's Crim. Law, 44; *King v. Osmer*, 5 East, 304-308.

The defendants, therefore, in resisting the officer in making an arrest under the warrant in question, if they were guilty of no improper or excessive force or violence, did not do an unlawful act by lawful means, or a lawful act by unlawful means, and so could not be convicted of the misdemeanor of a riot, with which they are charged in the indictment.

The instructions under which the case was submitted to the jury did not meet this aspect of the case. It must therefore go to a new trial.

Exceptions sustained.

WARRANT MUST DESCRIBE WITH CERTAINTY the person whose arrest it requires: *Haskins v. Young*, 31 Am. Dec. 426.

THE PRINCIPAL CASE WAS CITED in *Commonwealth v. Intoxicating Liquors*, 105 Mass. 181, to the point that a warrant to search for intoxicating liquors under the statute is void if it omits to allege, in conformity with such statute, that probable cause has been shown for it to issue; and being thus defective on its face will not protect an officer in its service. And where the defendant has used no more force than is reasonably necessary to remove the officer who attempts to serve such a warrant, an indictment for an assault cannot be maintained.

COMMONWEALTH v. SMITH.

[10 ALLEN, 448.]

RAILROAD COMPANY IS NOT AUTHORIZED BY COMMON LAW TO ALIENATE OR MORTGAGE ITS FRANCHISE.—A railroad company, created for the express and sole purpose of constructing, owning, and managing a railroad; authorized to take land for this public purpose under the right of eminent domain; whose powers are to be exercised by officers expressly designated by statute; having public duties, the discharge of which is the leading object of its creation; and which is required to make returns to the legislature, — is not authorized by common law to alienate or mortgage its franchise without authority other than that derived from the fact of its own incorporation.

CORPORATIONS HAVE POWER BY COMMON LAW TO ISSUE BONDS, but under the statute of Massachusetts, railroad corporations have no power to issue bonds for the payment of money, except for the purposes and in the mode therein authorized. All bonds issued otherwise are void.

MORTGAGE IS VOID WHICH IS MADE TO SECURE RAILROAD BONDS issued for purposes not authorized by the statute, and not in the mode therein prescribed.

RAILROAD BONDS ISSUED AND MORTGAGE GIVEN OF ITS FRANCHISE AND OTHER PROPERTY IN VIOLATION OF STATUTE MAY BE ATTACKED as invalid, even in a collateral proceeding, by one who has taken a valid second mortgage on the property, and not made expressly subject to the former mortgage.

RIGHTS OF SECOND MORTGAGEE OF RAILROAD AND ITS FRANCHISE WHERE FIRST MORTGAGE IS VOID. — One holding a valid second mortgage upon a railroad and its franchise, and not made expressly subject to a former first mortgage, has a plain, adequate, and complete remedy at law, and cannot, therefore, maintain a bill in equity to procure the cancellation of such first mortgage, which is void, and thus remove a cloud upon his title.

BILL in equity seeking to impeach the validity of a mortgage, executed on July 30, 1855, by the Troy and Greenfield Railroad Company to the defendants as trustees. The mortgage, in terms, covered the franchise, railroad, and all other property of the corporation, then owned or thereafter to be acquired, and was made to secure bonds to the amount of nine

hundred thousand dollars, to be issued to the contractor as part compensation for constructing the railroad. It was payable in thirty years from date. This mortgage recited the provisions of a contract for the construction of the railroad, dated December 30, 1854, to the effect that such bond should be given; and it was made subject to a prior mortgage to the commonwealth, to secure state bonds to the amount of two million dollars, which the commonwealth was to issue under the provisions of the statute of 1854, chapter 226. After the execution of the mortgage to the defendants, the commonwealth received two other mortgages upon the railroad and franchise of said company, one of which was dated on July 6, 1860, and the other on March 5, 1862. It also received a surrender from the corporation of all their property subject to redemption under the statute of 1862, chapter 156. On September 4, 1862, the commonwealth took possession of the mortgaged premises for breach of condition. Under their various mortgages the commonwealth had, at various times from October, 1858, to July, 1861, advanced to said company large sums of money, amounting in all to several hundred thousand dollars. The corporation, under their mortgage to defendants, had, at various times from August, 1855, to July, 1861, issued bonds to the amount in all of six hundred thousand dollars, payable in thirty years from date. The corporation had issued no other bonds than those mentioned above; but they were issued in good faith, and were held by *bona fide* holders. The commonwealth, before advancing any money to the corporation, had actual notice of the execution of the mortgage to the defendants, and of the fact that a number of bonds had been issued under the same. In December, 1856, the amount of capital stock of the corporation which had been paid in was only \$143,905.77.

D. Foster, for the commonwealth.

S. Bartlett and C. Allen, for the defendants.

By Court, HOAR, J. The question whether the mortgage made to the defendants by the Troy and Greenfield Railroad Company is of any validity against the commonwealth requires the court to give a construction to the provisions of Stats. 1854, c. 286. To ascertain what the legislature intended to authorize or prohibit by that statute, it will be expedient first to consider what were the powers of railroad companies

in relation to the issue of bonds and the making of mortgages at common law, or before the statute was enacted.

There seems to be no reason why a railroad corporation should not be considered as having power to make a bond for any purpose for which it may lawfully contract a debt, without any special authority to that effect, unless restrained by some restriction, express or implied, in its charter, or in some other legislative act. A bond is merely an obligation under seal. A corporation having the capacity to sue and be sued, the right to make contracts, under which it may incur debts, and the right to make and use a common seal, a contract under seal is not only within the scope of its powers, but was originally the usual and peculiarly appropriate form of corporate agreement. The general power to dispose of and alienate its property is also incidental to every corporation not restricted in this respect by express legislation, or by "the purposes for which it is created, and the nature of the duties and liabilities imposed by its charter": *Treadwell v. Salisbury Mfg. Co.*, 7 Gray, 404 [66 Am. Dec. 490].

But in the case of a railroad company, created for the express and sole purpose of constructing, owning, and managing a railroad; authorized to take land for this public purpose under the right of eminent domain; whose powers are to be exercised by officers expressly designated by statute; having public duties, the discharge of which is the leading object of its creation; required to make returns to the legislature,—there are certainly great, and, in our opinion, insuperable objections to the doctrine that its franchise can be alienated, and its powers and privileges conferred by its own act upon another person or body, without authority other than that derived from the fact of its own incorporation. The franchise to be a corporation clearly cannot be transferred by any corporate body of its own will. Such a franchise is not, in its own nature, transmissible. The power to mortgage can only be co-extensive with the power to alienate absolutely, because every mortgage may become an absolute conveyance by foreclosure. And although the franchise to exist as a corporation is distinguishable from the franchises to be enjoyed and used by the corporation after its creation, yet the transfer of the latter differs essentially from the mere alienation of ordinary corporate property. The right of a railroad company to continue in being depends upon the performance of its public duties. Having once established its road, if that and its fran-

chise of managing, using, and taking tolls or fares upon the same are alienated, its whole power to perform its most important functions is at an end. A manufacturing company may sell its mill, and buy another; but a railroad company cannot make a new railroad at its pleasure.

The whole reasoning of the court in the case of *Whittenton Mills v. Upton*, 10 Gray, 582 [71 Am. Dec. 681], in which it was held that a manufacturing corporation has no power to make a contract of copartnership, applies with much greater force to the transfer of its franchise by a railroad company.

No case has been cited in which the exercise of such a power has ever been judicially sanctioned in this commonwealth, where there was not express legislative authority for it; and the cases in which the legislature has expressly conferred the power, or confirmed its exercise, furnish at once a strong implication that it would not otherwise exist, and afford a solution of the allusion to railroad mortgages which occurs in the statutes.

Coming, then, to the consideration of the statute of 1854, we find it entitled "An act to authorize railroad companies to issue bonds." The first section recites the purposes for which a railroad corporation may issue bonds, namely, "for the purpose of funding its floating debt, or for money which it may borrow for any purpose sanctioned by law." This is, on its face, merely permissive. But it presents this alternative of construction: either the corporation did not, in the view of the legislature, have the right to issue bonds without the permission, in which case all the conditions and limitations attached to the privilege must be held to qualify and define the extent of the permission given; or if the full right existed when the statute was passed, then it seems impossible to give any other sensible meaning to its provisions, except to construe it as prescribing the conditions and limitations under which the power might thereafter be exercised. The question is, Did the legislature intend that these companies should be allowed to issue bonds only in the mode and for the purposes authorized by the statute? If that intention is made apparent, it makes no difference whether the language is affirmative or negative. The same section, then, contains two provisions: 1. That the issue of bonds shall be authorized by a majority of the stockholders, at a meeting called for the purpose; and 2. That the amount of bonds issued shall not exceed the amount of capital actually paid in. The second section pro-

vides that such bonds may be issued in sums of not less than one hundred dollars each, payable at periods not exceeding twenty years from the date thereof, and at a rate of interest not exceeding six per centum per annum, payable annually or semi-annually. The language is still affirmative and permissive, but strictly limiting the nature and extent of the act allowed. The third section enacts that no railroad corporation, having issued any bonds under the provisions of the act, shall subsequently make or execute any mortgage upon its road, equipment, and franchise, or any of its property, without including in and securing by said mortgage all such bonds previously issued, and all other pre-existing debts and liabilities of said corporation. This section certainly implies that a railroad corporation may mortgage its road and franchise under some circumstances, but gives no direct authority to make such a mortgage; and it plainly prohibits any mortgage which does not conform to the rule imposed. The fourth and fifth sections provide securities for the correct issue of the bonds, and for making them binding on the corporation, though sold at less than par.

The court are all of opinion that the statute was intended to prescribe the terms and conditions on which railroad corporations should thenceforth be allowed to issue bonds, and that any bonds which have been issued since its passage and do not conform to those conditions are made in violation of law, and are therefore void. We cannot suppose that the legislature could intend to pass an act to make legal certain bonds which the corporations had full power to issue without such authority, and which would leave all other bonds of equal validity. It must be remembered that these corporations are bodies created for public purposes; that their charters are made subject to repeal or alteration at the pleasure of the legislature; and that the commonwealth has reserved full power to regulate and control their action by general or special laws. The language of the statute is in substance this: "Such are the bonds which railroad corporations may henceforth issue." To declare that they may be issued on certain fixed conditions is, in effect, to enact that they shall not be issued in any other manner.

That bonds issued in violation of a statute are void was held in a recent case in the queen's bench in England,—*Chambers v. Manchester and Milford R'y*, 5 Best & S. 588. The prohibition in the statute on which that case depended was more direct, but the principle applicable to it is the same, and rests upon strong and just foundations in reason.

The bonds issued by the Troy and Greenfield Railroad Company, for securing which the mortgage held by the defendants, as trustees, was made, are payable at a period exceeding twenty years from their date, and were issued to an amount very largely in excess of the amount of capital stock actually paid in. The legislature did not mean that such bonds should be made. Their illegality is apparent upon their face, and open equally to the knowledge of the party who issued and the party who received them.

The bonds being invalid, the mortgage to secure them is invalid likewise. It becomes unnecessary, therefore, to consider the questions which have been so largely and ably discussed in the argument, to what extent the power to make a mortgage of a railroad has been recognized, or exists by implication under our statutes, and especially whether such a power is conferred, to any extent, by the statute of 1854. But it may be well to observe that the object of that statute seems to have been exclusively the regulation of the issue of bonds by railroad corporations; and that mortgages are only mentioned incidentally, with reference to the future security of the bonds, and not with any view of defining or extending the general power of making mortgages. And further, we understand the bonds which are the subject of the statute to be only bonds for the payment of money, constituting a funded debt of the company; and do not consider the opinion which we have expressed to have any application to bonds for other purposes, and of a different character, such as bonds to dissolve an attachment, for the conveyance of land, or the like. Nor do we mean to decide that some of the provisions of the statute may not be merely directory.

We find no evidence that the commonwealth has ever known and sanctioned the irregular and illegal issue of the bonds in question, either directly or by implication. Nor do we think that they fall within the class of cases in which it has been held that a violation of corporate powers cannot be taken advantage of collaterally. The second mortgage to the commonwealth gives it a direct interest in the property, and not being made expressly subject to any prior encumbrance, gives the right to maintain and prove that the supposed conveyance to the defendants was illegal and void.

The result to which the point decided leads is this: That the defendants having no title which they can maintain against either of the mortgages to the commonwealth, the plaintiffs

have a plain, complete, and adequate remedy at law for any interference with the mortgaged property, and the bill must be dismissed.

POWER OF RAILROAD CORPORATION TO ALIENATE, TRANSFER, OR MORTGAGE ITS FRANCHISE AND OTHER PROPERTY: *Arthur v. Commercial etc. Bank*, 48 Am. Dec. 719; *Bardston etc. R. R. Co. v. Metcalfe*, 81 Id. 541; *Jessup v. Bridge*, 79 Id. 513; *Coe v. Columbus etc. R. R. Co.*, 75 Id. 518, and extended note thereto 548-551, discussing the subject and citing the principal case.

BILL IN EQUITY IS MAINTAINABLE WHERE THERE IS NO ADEQUATE REMEDY AT LAW: See note to *Rogers v. Ward*, 85 Am. Dec. 710.

THE PRINCIPAL CASE WAS CITED in each of the following authorities, and to the point stated: A corporation created for the very purpose of constructing, owning, and managing a railroad for the accommodation and benefit of the public cannot, without distinct legislative authority, as shown by previous leave or subsequent ratification, make a mortgage or any other alienation, absolute or conditional, either of the general franchise to be a corporation or of the subordinate franchise to manage and carry on its corporate business; and this is the English law: *Richardson v. Sibley*, 11 Allen, 67; *Adams v. Boston etc. R. R. Co.*, 4 Nat. Bank. Reg. 100; *Daniels v. Hart*, 118 Mass. 544. And this rule is not founded upon any technical theory nor arbitrary rule, but upon the reasonable implication that such alienation would be contrary to the intention of the legislature, and subversive of the purposes for which the franchise was granted. It is founded in considerations of public policy which neither the corporation nor any other person can be allowed to evade or disregard: *East Boston etc. R. R. Co. v. Eastern R. R. Co.*, 13 Allen, 423; *Richardson v. Sibley*, 11 Id. 72. And it makes no difference whether the land of a railroad corporation was acquired by purchase or by the statute mode; it cannot be sold and transferred by the corporation without legislative authority: *Pinkerton v. Boston etc. R. R. Co.*, 109 Mass. 541. Where the plaintiff can obtain a plain, adequate, and complete remedy by an action at law in any form, a bill in equity will not lie: *Clouston v. Shearer*, 99 Id. 211; *Swainscott Machine Co. v. Perry*, 119 Id. 125; *McNeil v. Ames*, 120 Id. 485. And this applies in suits by the commonwealth as well as in those brought by private persons: *Attorney-General v. Railroad Companies*, 35 Wis. 547; *Attorney-General v. Tudor Ice Co.*, 104 Mass. 244. And a bill in equity is demurrable, not only if it shows that the plaintiff has a remedy at law equally sufficient and available, but also if it fails to show that he is without such remedy: *Jones v. Newhall*, 115 Id. 253.

BUTTERFIELD v. WESTERN RAILROAD CORPORATION.

[10 ALLEN, 532.]

PLAINTIFF MUST PROVE THAT HE USED DUE CARE TO AVOID COLLISION by which he was injured, in order to recover damages of a railroad company for a personal injury sustained thereby through their negligence. Their negligence would not authorize him to maintain an action if he was also negligent.

"DUE CARE" MEANS REASONABLE CARE adapted to the circumstances of the case.

FAILURE TO USE ONE'S SENSES WITHOUT REASONABLE EXCUSE IS FAILURE TO USE "REASONABLE CARE." Thus, the crossing of a place known to be so dangerous as a railroad track frequently is, by reason of the passing trains, reasonably requires a high degree of watchfulness and attention; and before attempting to cross, a man should make a reasonable use of his sense of sight as well as of hearing, in order to ascertain whether he will expose himself to a collision.

MERE SCINTILLA OF EVIDENCE IS NOT SUFFICIENT TO AUTHORIZE JUDGE TO SUBMIT QUESTION of plaintiff's use of due care to jury, or to submit the question of the defendant's negligence to them. There must be evidence upon which a jury may reasonably and properly infer that plaintiff used ordinary care, or that there was negligence on the part of defendant.

NEGLIGENCE SUFFICIENT TO WITHDRAW CASE FROM JURY. — Plaintiff's neglect to use his eyes shows such want of due care on his part, and such palpable negligence, that the court will be authorized, in an action by him to recover damages for an injury sustained by him from a collision with a passing train, to instruct the jury that he is not entitled to a verdict, where his own testimony shows that, while traveling upon a highway, in a dark and stormy night, toward a railroad crossing, in a level country, and being well acquainted with the highway and railroad, knowing that he was near the crossing, and that a train would soon pass, he attempted to cross the railroad without looking to see whether a train was coming, and where, if he had looked, he would have seen the train, for the engine had a head-light. The fact that he had to obstruct his sight to prevent his hat from being blown away, and that he relied upon his hearing, would not excuse him, though the bell was not rung nor the whistle sounded.

TORT to recover damages for a personal injury received by the plaintiff in consequence of being run over by the locomotive-engine of defendants. Verdict for the plaintiff, with fifteen hundred dollars damages, upon facts stated in the opinion. The judge declined, on motion of the defendants, to rule as matter of law that the plaintiff had shown such carelessness as to deprive him of his right to recover, and the defendants alleged exceptions.

W. G. Bates and M. B. Whitney, for the defendants.

E. B. Gillett, for the plaintiff.

By Court, **CHAPMAN, J.** This case does not come before us upon a motion to set aside the verdict because it was against the evidence or the weight of the evidence, but upon exception to the refusal of the presiding judge to instruct the jury that there was no legal and sufficient evidence to authorize them to find a verdict for the plaintiff.

It is admitted by the plaintiff's counsel that the burden was on him to prove that he used due care to avoid the collision by which he was injured. By due care is meant reasonable care,

adapted to the circumstances of the case. The crossing of a place known to be so dangerous as a railroad track frequently is, by reason of the passing trains, reasonably requires a high degree of watchfulness and attention. Before attempting to cross, a man should make a reasonable use of his sense of sight as well as of hearing, in order to ascertain whether he will expose himself to a collision. If he fails to use his senses without reasonable excuse, he fails to use reasonable care: *Shaw v. Boston and Worcester R. R.*, 8 Gray, 73; *Warren v. Fitchburg R. R.*, 8 Allen, 227 [85 Am. Dec. 700]; *Commonwealth v. Fitchburg R. R.*, 10 Id. 189; *Stevens v. Oswego & S. R. R.*, 18 N. Y. 422.

In *Toomey v. London etc. R. R.*, 3 Com. B., N. S., 146, it is said that a mere *scintilla* of evidence is not sufficient to authorize a judge to submit the question of the defendants' negligence to a jury; but there must be evidence upon which a jury may reasonably and properly infer that there was negligence on his part. This rule of evidence is substantially the same with that laid down in *Denny v. Williams*, 5 Allen, 1, and applies with as much force to the plaintiff's proof of due care on his part as to the proof of negligence on the part of the defendant: See also *Philadelphia & R. R. R. v. Hummell*, 44 Pa. St. 375; *Wilds v. Hudson River R. R. Co.*, 24 N. Y. 430.

All the evidence as to what the plaintiff did comes from his own testimony. He states, in substance, that on the 30th of January, 1862, he started from the depot in Westfield to go on foot to his own house in a westerly direction. He was well acquainted with the highway and railroad. He attempted to cross the railroad without looking or intending to look to see whether a train was coming, and as he stepped upon the track he was struck by a train that was passing at that moment.

He admits that if he had looked he would have seen the train. It came from the west, and for half a mile west of the highway the track was in plain sight. As he approached the crossing the highway was for a considerable distance near to the track, and nearly upon the same level with it, so that the approaching train would be directly before him. As the way turns to cross the track it rises a little. It was dark, but the engine had a head-light, which he could not have failed to see if he had looked.

He also knew that a train was due from the west about that time, and that it had not passed, and he supposed it must be near.

He states his reasons for neglecting to look. It was a stormy

night, raining, blowing hard from the northwest, and snowing some. He had his hand up, holding his hat on his head, and this prevented him from seeing the train. The traveling on the highway was very bad; considerable snow had fallen some time before, and its surface was frozen; the road had been plowed out to the crossing, and the crust had slipped back into the path. The ice did not fall over, but slid right back. He could not tell which furrow he walked in; sometimes one, and sometimes the other. He was listening for the cars; his attention was called to the subject, and he expected to hear the bell or the whistle, but there was no bell sounded or whistle blown.

From this statement it is to be inferred that he had occasion to use his eyes pretty constantly for the guidance of his own footsteps as he walked, and that he was under the necessity of obstructing his sight for the purpose of preserving his hat from being blown away. Yet, as he had the control of his own movements, and could stop or check his speed at pleasure, it was in his power to look up frequently, and he might easily have seen the train. The noise of the wind and storm and the breaking of the snow crust as he walked must have made it more difficult than usual to hear the noise of the train, and furnished no excuse for trusting exclusively to his sense of hearing.

We must assume it to be true that neither the bell nor whistle was sounded, and that the defendants violated their duty in this respect. A traveler has a right to expect that they will perform this duty, and has some right to expect that he will hear the noise. But this expectation does not excuse him from exercising reasonable care to ascertain by sight as well as hearing whether there is a train coming immediately upon him as he attempts to cross the track. The negligence of the company does not authorize him to maintain an action if he also is negligent. He states that he did not know when he came upon the track, although the snow was entirely removed from it. But he had known for a considerable time that he was coming near it; he knew of the rising ground, and the train had been in plain sight for a considerable time.

The plaintiff's neglect to use his eyes was palpable negligence, and he states no reasonable excuse for it. The jury ought therefore to have been instructed that he had offered no evidence of due care on his part, and was not entitled to a verdict.

Exceptions sustained.

ACTION FOR NEGLIGENCE—PLAINTIFF MUST PROVE THAT HE USED DUE CARE: *Gahagan v. Boston etc. R. R. Co.*, 79 Am. Dec. 724; note to *Johnson v. Hudson River R. R. Co.*, 75 Id. 383; *Gilman v. Eastern R. R. Corp.*, ante, p. 635; *McCully v. Clarke*, 80 Id. 584, and note 588; *Wilson v. City of Charlestown*, 85 Id. 693, and note; *Warren v. Fitchburg R. R. Co.*, 85 Id. 700, and note.

PLAINTIFF CANNOT MAINTAIN ACTION FOR NEGLIGENCE WHERE HE WAS ALSO NEGLIGENCE: *Heil v. Glanding*, 82 Am. Dec. 537, and note 540, showing the application of the rule to cases of collision; *Wilson v. City of Charlestown*, 85 Id. 693, and note.

WHAT IS DUE, REASONABLE, OR ORDINARY CARE DEPENDS ON SUBJECT-MATTER to which the case is to be applied, and the attendant circumstances: *Scott v. Hunter*, 84 Am. Dec. 542; *Davis v. Winslow*, 81 Id. 573; *Fletcher v. Boston etc. R. R.*, 79 Id. 695, and note 699; *Swann v. Brown*, 72 Id. 568, and note 570; *Hanlon v. Keokuk*, 74 Id. 276; *Caymer v. Taylor*, 69 Id. 317; *Owners of Steamboat Farmer*, 62 Id. 718.

FAILURE TO USE ONE'S SENSES SHOWS WANT OF REASONABLE CARE, WHEN: See *Warren v. Fitchburg R. R. Co.*, 85 Am. Dec. 700, and note; note to *Snow v. Housatonic R. R. Co.*, 85 Id. 720.

NEGLECTANCE SUFFICIENT TO WITHDRAW CASE FROM JURY: *Todd v. Old Colony etc. R. R. Co.*, 83 Am. Dec. 679, and note 680; note to *Lucas v. New Bedford etc. R. R. Co.*, 66 Id. 410; *Fox v. Sackett*, *infra*; *Warren v. Fitchburg R. R. Co.*, 85 Id. 700, and notes.

THE PRINCIPAL CASE WAS CITED in each of the following authorities, and to the point stated: Where a party attempts to cross a railroad track without looking up to see whether a train is approaching, and without any reasonable excuse for not so looking, he is careless, and guilty of such contributory negligence that he cannot recover for an injury sustained in so attempting to cross: *Wheelock v. Boston etc. R. R. Co.*, 105 Mass. 207; *Allyn v. Boston etc. R. R. Co.*, 105 Id. 79; *Brooks v. Somerville*, 106 Id. 275; *Mayo v. Boston & M. R. R.*, 104 Id. 142; *Wright v. Boston & M. R. R.*, 129 Id. 443; *Bellefontaine R'y Co. v. Hunter*, 33 Ind. 363. Nor does it alter the case that the defendant may have been negligent in not ringing the bell or blowing the whistle, so long as the plaintiff has been guilty of negligence which contributed to the result: *Lake Shore etc. R. R. Co. v. Miller*, 25 Mich. 291. Where the uncontroverted facts in a case show negligence on the part of the plaintiff, or where there is no evidence to show that he used due care, it is the duty of the court to instruct the jury to return a verdict for the defendants: *Allyn v. Boston etc. R. R. Co.*, 105 Mass. 78, 79.

FOX v. SACKETT.

[10 ALLEN, 585.]

CASE INVOLVING DUE CARE ON PART OF PLAINTIFF SHOULD BE WITHDRAWN FROM CONSIDERATION OF JURY ONLY WHEN there is an entire absence of any facts to authorize the inference that the plaintiff was conducting himself with reasonable prudence and discretion, or the undisputed facts of the case prove actual negligence.

QUESTION AS TO PLAINTIFF'S USE OF DUE CARE SHOULD BE SUBMITTED TO JURY where, in an action to recover damages for an injury sustained

from a collision with a wagon left standing by the defendant in a highway, the evidence shows that the plaintiff was accustomed to drive horses, and that the accident happened while he was driving a gentle horse in a dark night, on a slow trot, looking out on one side of the horse for a blanket which he had lost shortly before from his wagon, while his companion was looking for the blanket on the other side, and neither of them saw the defendant's wagon before the collision, though the plaintiff had seen the obstruction there on the day of the accident. He had a right to suppose that the unlawful obstruction would have been removed before nightfall; and it cannot be held as a matter of law that he was so careless as to preclude his recovery.

TORT to recover damages for an injury to the plaintiff's person and property sustained by coming in collision with a wagon left standing in a highway by the defendant. The place of the accident was opposite the defendant's barn, and the highway there was about twenty-six feet wide, with a steep bank on the east side and a fence on the west. At the foot of the bank there was a pile of wood, and two large wood-wagons stood west of the pile, the wheels of which were in the road. On the west side of the road there was a quantity of old timber. That these obstructions were put there by the defendant was not disputed. On the night of November 2, 1860, the plaintiff, who was accustomed to drive horses, and who was acquainted with the road, passed by in a wagon, driving a gentle horse, on his way to Granville. He was accompanied by one Meacham, and had seen the wagons there on that afternoon. After passing the place of the accident about a quarter of a mile he missed a blanket with a white lining from his wagon, and drove back to look for it. He drove back on a slow trot, Meacham looking out for the blanket on the west side of the horse, and the plaintiff on the east side. The night was dark, and he did not see the wood-wagons until the collision from which the injuries were received. The judge ruled that the plaintiff had failed to prove by such evidence that he was in the exercise of due care, and directed a verdict for the defendant, which was accordingly rendered, and the plaintiff alleged exceptions.

W. G. Bates and M. B. Whitney, for the plaintiff.

N. T. Leonard and E. B. Gillett, for the defendant.

By Court, BIGELOW, C. J. It seems to us that there was positive evidence in this case of due care on the part of the plaintiff, which ought to have been submitted to the jury. It is only when there is an entire absence of any facts to au-

thorize the inference that the plaintiff was conducting himself with reasonable prudence and discretion, or the undisputed facts of a case prove actual negligence, that a case like the present should be withdrawn from the consideration of the jury. Such was not the state of the evidence at the trial. On the contrary, it appeared that the night was dark; that the horse of the plaintiff was gentle; that he was driving at the time of the accident on a slow trot; and that he and his companion were each looking out of the plaintiff's vehicle on the sides of the road at the time the collision took place. These facts were all competent, and had a direct tendency to show that the accident resulted solely from the obstruction of the road by the wagons of the defendant.

Besides, it appears that the wheels of one of these wagons against which the vehicle of the plaintiff struck was in the traveled track on one side of the road, in a position which might well cause an accident to a person using the highway in the exercise of due care. The fact that the plaintiff had seen the wagon in the same place in the course of the day, and before the accident happened, does not necessarily show that he was wanting in due care: *Snow v. Housatonic R. R.*, 8 Allen, 450 [85 Am. Dec. 720]; *Reed v. Deerfield*, 8 Id. 522. Especially in this case, where the obstruction was unlawful, the plaintiff had just ground to suppose that it would be removed before nightfall.

Exceptions sustained.

CONTRIBUTORY NEGLIGENCE SUFFICIENT TO WITHDRAW CASE FROM JURY: *Todd v. Old Colony etc. R. R. Co.*, 83 Am. Dec. 679, and note thereto 680; note to *Lucas v. New Bedford etc. R. R. Co.*, 66 Id. 410; *Butterfield v. Western R. R. Corp.*, ante, p. 678; note to *Wilson v. City of Charlestown*, 85 Id. 693; note to *Warren v. Fitchburg R. R. Co.*, 85 Id. 700; *Snow v. Housatonic R. R. Co.*, 85 Id. 720, and note.

CASE INVOLVING PLAINTIFF'S USE OF DUE CARE SHOULD BE SUBMITTED TO JURY, WHEN: See note to *Gahagan v. Boston etc. R. R. Co.*, 79 Am. Dec. 727; *Stevens v. Inhabitants of Buxford*, ante, p. 616; extended note to *O'Malley v. Dorn*, 73 Id. 408, on law of the road, and citing the principal case; *Warren v. Fitchburg R. R. Co.*, 85 Id. 700, and note; *Snow v. Housatonic R. R. Co.*, 85 Id. 720, and note.

KNOWLEDGE OF DEFECT IN HIGHWAY, EFFECT OF, AS TO RULE CONCERNING CARE AND CONTRIBUTORY NEGLIGENCE: See *Hanlon v. Keokuk*, 74 Am. Dec. 276, and note 278; note to *Mount Vernon v. Dusouchett*, 54 Id. 469.

THE PRINCIPAL CASE WAS CITED in each of the following authorities, and to the point stated: Where a case presents a variety of circumstances to be considered in connection with each other, and depends partly upon inferences of fact to be drawn from these circumstances, the questions as to the

plaintiff's use of due care should be submitted to the jury: *Quirk v. Holt*, 99 Mass. 167. The refusal of the judge to withdraw a case from the jury cannot, in any case, be construed as an indication that in his opinion the jury ought to find in the plaintiff's favor upon the question of ordinary care. On the contrary, it is his duty to submit it to the jury, if there is any evidence to justify a finding, although in his opinion its preponderance should be against the plaintiff: *Gaynor v. Old Colony etc. Ry Co.*, 100 Id. 212.

COMMONWEALTH v. THOMPSON.

[11 ALLEN, 28.]

MAN IS GUILTY OF ADULTERY WHO MARRIES AND COHABITS WITH WOMAN in good faith and in the belief that she is a widow, where she had left her husband, and had remained absent from him for more than seven years without hearing of him, if her husband is in fact still living; for in such case no presumption of his death arises; but the rule would be otherwise, in such a case, if the husband had deserted her.

INDICTMENT for adultery. It appears that defendant married Emeline Carlton, and lived with her as his wife, in the belief that she was a widow. She had thirteen years previously been married to William B. Carlton, but after two years, during which she claims he ill treated and neglected to provide for her, she left him, and for the eleven years previous to her second marriage had not heard of him, except that she had heard before the latter marriage that one William B. Carlton had been killed in a drunken row, and believed that it was her husband who was killed. It was shown that her husband in fact was alive at the time of her second marriage. The court charged the jury that when a wife departs from her husband, and remains absent and distant from him, as in the present case, without knowledge or inquiry respecting him, no presumption of his death arises, from the fact that she had not heard from him for seven years, which would justify her in marrying and cohabiting with another man, and justify another man in marrying and cohabiting with her; and that the facts in this case, though they might go greatly to mitigate the offense of the defendant, did not amount to a legal justification. Defendant was found guilty, and alleged exceptions.

G. F. Verry, for the defendant.

Reed, attorney-general, for the commonwealth.

By Court, DEWEY, J. As already stated in reference to the present case when presented on a former bill of exceptions (8 Allen, 591), the mere fact that the defendant married Emeline B. Carlton in ignorance of the fact that she had a husband

living constitutes no legal defense to this indictment. The most favorable view in which this defense could be sustained was that stated in the former opinion, "that if it appeared that the husband had absented himself from his wife, and remained absent for the space of seven years together, a man who should, under the existence of such circumstances, and not knowing her husband to have been living within that time, in good faith and in the belief that she had no husband, intermarry with her and cohabit with her as his wife, would not by such acts be criminally punishable for adultery, although it should subsequently appear that the former husband was then living."

But the case stated in this bill of exceptions is wanting in one of the essential facts stated as the foundation for a right to presume the death of the husband. It is only to the person who leaves his home or place of residence and is gone more than seven years and not heard of that this presumption is applicable. Here the wife went away, and the husband, for aught that appears, remained at Lawrence, or in the vicinity. The facts show affirmatively that he was residing in Dracut in this commonwealth in 1859. Dracut was the place of residence of the parties for two years succeeding their marriage, and was the only place where they lived together, except in Lawrence, which is in its vicinity.

In the facts stated we see no sufficient ground for any presumption of the death of the husband upon which the wife of Carlton or the defendant could properly have acted. The superior court very correctly marked the distinction, in the case where the wife leaves her husband and remains absent from him, in the ruling and instructions given to the jury.

The fact that the misconduct of the husband authorized the wife thus to leave him and continue absent, although it might justify her against all cause of complaint by the husband, and even warrant her obtaining a legal divorce for desertion, if continued for five years, under the provisions of our statute, does not affect the legal guilt of the defendant, however much these circumstances may avail him in mitigation of his punishment.

Exceptions overruled.

THE PRINCIPAL CASE IS CITED in *Moors v. Moors*, 121 Mass. 233, and it is held that while a mistake in believing that one has been divorced when such is not the fact will operate to mitigate the punishment, it will be no defense in a prosecution for adultery.

CHASE v. KITTREDGE.

[11 ALLEN, 49.]

IT IS INSUFFICIENT ATTESTATION OF WILL for subscribing witness to write his name in the absence of the testator, and in anticipation of the testator's signature, although he afterwards acknowledges it in the presence of the testator and of the other subscribing witnesses.

PETITION for probate of will of Simeon Daniels. Joseph A. Sprague, one of the attesting witnesses, testified as follows: "Mr. Daniels came into my office and told me how to draw his will. I made a rough sketch of a will, and read it to him, and he said it was all right, and went out. I copied it, and he came back and sat by my side. I read the will down to the seal, and said, 'Does that suit you?' He said it did. I then read the witness clause and my name, and said, 'Mr. Daniels, I have written my name as a witness to your will.' After talking with him some time I went and called two other witnesses, Holden R. Greene and Carlton Cushman. When they came in they stood around the table. I said, 'This is Mr. Daniels's last will and testament,' and he bowed assent. He took the pen and wrote his name opposite the seal. I either repeated or read the witness clause to the other two witnesses. Then, pointing to my signature, I said to Cushman or Greene, 'Sign your name under mine, where I have signed as a witness.' Cushman signed his name, and Greene signed his name, and they did not stay a moment. Mr. Daniels remained after they went out. We three were all present when he signed his name. We were all close together, and he could see where I pointed for the other witnesses to sign. The will was in full view. I put on the seal and my name while he was gone. I did not rewrite or retrace my name after he signed his." The will was admitted to probate, and from the decree an appeal was taken.

E. Mellen, for the appellants.

P. E. Aldrich, for the appellee.

By Court, GRAY, J. This case presents an important question of construction of the statute of wills, upon which there has been much apparent, and some real, conflict of judicial opinion, and in the consideration of which it is essential to keep in mind the exact language of the enactments under which cases have arisen.

By the original English Statute for the prevention of frauds

and perjuries, passed in 1676, it was enacted that "all devises and bequests of any lands or tenements shall be in writing, and signed by the party so devising the same, or by some other person in his presence and by his express directions, and shall be attested and subscribed, in the presence of the said devisor, by three or four credible witnesses, or else they shall be utterly void and of none effect": Stat. 29 Car. II., c. 3, sec. 5. That act did not extend to the colony of Massachusetts, which had been previously settled, and was not named therein: *Anonymous*, 2 P. Wms. 75; Stat. 25 Geo. II., c. 6, sec. 10. But the provision was re-enacted here in the same words in the first year after the province charter; and again in 1783, substituting only the words "three or more" for "three or four" witnesses: Prov. Stat., 4 W. & M., ed. 1726, c. 3, sec. 3, p. 5; Anc. Chart. 234; Stats. 1783, c. 24, sec. 2. It was retained and extended to personal estate in 1836 in this form: "No will [excepting nuncupative wills] shall be effectual to pass any estate, whether real or personal, nor to charge or in any way affect the same, unless it be in writing, and signed by the testator or by some person in his presence and by his express direction, and attested and subscribed, in the presence of the testator, by three or more competent witnesses": R. S., c. 62, sec. 6. And the words just quoted have been incorporated, with trifling variations, into the General Statutes, c. 92, sec. 6.

This provision, it will be observed, does not expressly require that the testator should sign in the presence of the witnesses; nor that the witnesses should subscribe in the presence of each other, nor even that they should know that the instrument is a will. Courts will not require formalities which the statutes do not. It is accordingly the well-settled construction, both in England and in this commonwealth, that it is sufficient for the testator, in any form of words, to acknowledge or recognize his signature in the presence of the witnesses, either together or separately, with no attestation clause beyond the single word "witness," and without their knowing what the instrument is. The authorities upon these points are collected in the elaborate judgment of Mr. Justice Dewey in *Ela v. Edwards*, 16 Gray, 91. It is equally well settled that when the attesting witnesses are dead or out of the state proof of their handwriting is sufficient evidence that the statute has been complied with: *Nickerson v. Buck*, 12 Cush. 344; *Ela v. Edwards*, *supra*.

The positive requirements of the statute have always been reasonably construed by the courts, so as not needlessly to embarrass compliance with them in making any will, or proof of such compliance upon the offer of the will for probate. It has long been held that evidence that a witness was in such a position that he and the testator might have seen one another will authorize the inference that he was in the presence of the testator and sufficiently near to attest his signature. And the signature of the testator, if affixed in good faith for the purpose of executing his will, need not be in any particular form; a man who cannot write his own name is not to be deprived of the right to make his will; and courts will not go into nice questions of the degree of the testator's education or his physical strength to sign his name in full, but will hold a mark sufficient in any case: *Baker v. Dening*, 8 Ad. & E. 94; S. C., *nom. Taylor v. Dening*, 3 Nev. & P. 228; *Nickerson v. Buck*, 12 Cush. 344.

The question now before us is of the meaning of that clause of the statute which requires the witnesses to "attest and subscribe" the will "in the presence of the testator."

The only case under the statute of 29 Carlos II. which we have seen in which it was even contended by counsel that an acknowledgment by a witness in the presence of the testator, of a signature made in his absence, was equivalent to a subscription in his presence, arose only six years after the passage of the statute, and the point does not appear to have been then decided: *Risley v. Temple*, Skin. 107. But the difference in the two clauses of the statute, the one not requiring the testator to sign in the presence of the witnesses, while the other expressly required the witnesses to subscribe in the presence of the testator, soon came to be recognized, and does not appear to have been afterwards lost sight of: *Hoil v. Clark*, 3 Mod. 219, 220; *Lee v. Libb*, 1 Show. 69; *Dormer v. Thurland*, 2 P. Wms. 510; *Stonehouse v. Evelyn*, 3 Id. 254; Bac. Abr., tit. Wills, D, 2; 2 Bla. Com. 377; 1 Browne's Civ. & Adm. Law, c. 10, note 27; 1 Roberts on Wills, Am. ed., 131; Floyer's Proctor's Practice, 127. The statute of frauds, while it required a will to be "attested and subscribed in the presence of the devisor by three or four creditable witnesses," required a revocation to be by a written will, "or other writing of the devisor, signed in the presence of three or four witnesses": Stat. 29 Car. II., c. 3, secs. 5, 6. The court of king's bench in 1689 were of opinion that a will, to revoke a former will,

must be "signed and subscribed" by the witnesses in the presence of the testator: *Eccleston v. Speke*, Carth. 81; S. C., Comb. 158. And Lord Chancellor Cowper was of the same opinion: *Onions v. Tyrer*, 1 P. Wms. 344. Lord Hardwicke, Chief Justice Willes, Chief Baron Parker, and Sir John Strange, M. R., when holding, in accordance with earlier and later decisions, that a testator's acknowledgment of his signature before the witnesses was a sufficient signing by him, even of a will revoking an earlier one, and that the words "signed in the presence of three or four witnesses," in the section concerning revocations, were limited to the last antecedent, "other writing," clearly implied that those words would not be satisfied by acknowledging a signature, instead of actually signing in the presence of the witnesses: *Ellis v. Smith*, 1 Ves. Jr. 10; S. C., 1 Dick. 225; and see 1 Jarman on Wills, 4th Am. ed., 153. The English cases in which it has been held that the witnesses to a will are not required by section 5 of the statute of Carlos II. to recite on the paper that they subscribe their names in the presence of the testator declare that they must actually so sign in his presence. Thus the court of common bench, in 1735, as reported by Lord Chief Baron Comyn, said: "The witnesses, by the statute of frauds, ought to set their names as witnesses in the presence of the testatrix": *Hands v. James*, Comyn, 582. And in a later case Lord Eldon said in the house of lords: "Your lordships know that it is necessary that the three witnesses should sign in the presence of the testator. . . . If it is proved that they did actually sign in the presence of the testator, the not recording that circumstance will not vitiate the will": *Rancliffe v. Parkyns*, 6 Dow, 202.

A new statute of wills was passed in England in 1837, requiring that the signature of a testator to a will, either of real or personal estate, shall be made or acknowledged by him "in the presence of two or more witnesses present at the same time, and such witnesses shall attest and shall subscribe the will in the presence of the testator": Stat. 1 Vic., c. 26, sec. 9. The decisions under this statute are uniform that one witness does not "attest and subscribe in the presence of" another unless he actually affixes his signature in the presence of the other; and these decisions bear directly upon the construction of the same words in the English statute of 29 Carlos II. and in our own statutes, requiring the will to be "attested and subscribed in the presence of" the testator by the witnesses.

The point was adjudged in the prerogative court of Canterbury by Sir Herbert Jenner Fust in several cases, the last of which, decided after full argument, and recognizing that "this case must form a leading case of its class," was strikingly analogous to the present. There the testator signed a codicil in the presence of one witness only, who at his request attested and subscribed it. Afterwards another witness, at the testator's request and in his presence, also attested and subscribed it, the first witness first pointing to her signature and saying, "There is my signature, and you had better place yours underneath": *Re Allen*, 2 Curt. Ecc. 331; *Re Simmonds*, 1 Notes of Cas. 409; S. C., 3 Curt. Ecc. 79; *Moore v. King*, 3 Id. 243; S. C., 2 Notes of Cas. 45. In a subsequent case the same able judge said of the witnesses: "No authority is given to them, as in the instance of the testator, to acknowledge their signatures previously written. The witnesses are to subscribe; in other words, they are required, I conceive, to do some act which shall be apparent on the face of the will. To pass over a signature, previously made, with a dry pen amounts, I think, to no more than an acknowledgment of a signature, which in the case of a witness has already been held not to be sufficient: *Moore v. King*. Saying and doing are not the same thing." And he therefore held that upon the re-execution of a will an attesting witness did not "subscribe" by tracing over his signature with a dry pen, "as nothing in fact was written": *Playne v. Scriven*, 1 Rob. Ecc. 775; S. C., 7 Notes of Cas. 122. He also decided that it was not an attestation and subscription for a witness to add his residence after his name already subscribed on a previous day: *Re Trevanion*, 2 Rob. Ecc. 311.

Other decisions of Sir Herbert Jenner Fust are directly to the point that a signature by the testator, after the witnesses have signed, is insufficient, even if he has previously read the whole will to them, or they add seals to their names after he signs. In the first of these cases, the judge significantly asked, "Is the paper a will before it is signed by the testator?" *Re Olding*, 2 Curt. Ecc. 865; *Re Byrd*, 3 Id. 117. In a later case, which was fully argued, he reaffirmed the rule, and gave his reasons more at length, saying: "The words of the section are very precise, and I think it would be attended with dangerous consequences if the court were to hold a will valid which has been signed in the presence of two witnesses, who have attested it before the signature of the testator was affixed

to the will; for where is the court to draw the line? Suppose the witnesses attested one hour before the testator signed, or a day, or a week, or any other time; where is the court to stop if it gave a latitude of construction to this section of the act? Suppose it were one month, or six months, or a twelvemonth, after the testator had signed the will; and whether it be at the time of the transaction or some time before makes no difference": *Cooper v. Bockett*, 3 Curt. Ecc. 659, 660. Dr. Lushington, sitting in the same court, held it to be a fatal objection to the validity of a will, that "there is no proof that the signature was affixed prior to the subscription of the witnesses": *Hudson v. Parker*, 1 Rob. Ecc. 39. And Sir John Dodson made a similar decision in *Shaw v. Neville*, 1 Jur., N. S., 408.

The law is stated in the same way, without criticism or dissent, by Lord St. Leonards, in his essay on the Real Property Statutes, 332, 336; and in his Handybook of Property Law, letter xix. And the decisions of Sir Herbert Jenner Fust have been approved and followed by Sir Creswell Creswell in the new English court of probate and divorce: *Charlton v. Hindmarsh*, 1 Swab. & T. 433; *Re Cunningham*, 29 L. J., N. S. (Prob.), 71; *Re Hoskins*, 32 Id. 158.

In *Charlton v. Hindmarsh*, *supra*, one witness, Frederick Wilson, signed his name in the testator's presence and at his request in the morning, omitting to cross the F in his signature. In the afternoon of the same day another witness attested and subscribed the will in the presence and at the request of the testator; and the first witness, as he testified, then acknowledged his signature to the second by saying that his name was there already, crossed the F, merely in pursuance of his habit of supplying the omission when he noticed it, and added the date, thinking that equal to a repetition of the signature, and with the object of making his signature of the morning a complete signature. From the decision of the judge ordinary against the will, an appeal was taken to the house of lords, who, by the concurrent opinions of lords Campbell, Cranworth, and Chelmsford, unanimously affirmed the judgment: *Hindmarsh v. Charlton*, 8 H. L. Cas. 160. The reasons for the decisions are best stated by Lord Cranworth, thus: "For the security of mankind, the legislature has thought fit to prescribe certain forms and rules, which are necessary to be complied with in order to authorize a distribution of property different from that which the law would make if there was no will; the legislature, in truth, on these forms being com-

plied with, putting into the hands of the party who is making a will power to dispose of his property in a way contrary to what but for the will would be the provision of the law. That it is reasonable that under these circumstances there should be some rules to be acted upon, no one can doubt; and those rules being established, this house, as the ultimate court of appeal, would be, I think, ill discharging its duty to the public if it were to listen to suggestions of minute differences which would not meet the ordinary apprehensions of mankind, and which would necessarily or naturally lead to great discussion and litigation. It has been determined, upon the construction of the last statute, and quite rightly determined, that there must be a subscription by two witnesses after the testator has signed the will in their presence or acknowledged his signature in their presence. . . . The acknowledgment of his signature by a testator is sufficient, but a witness stands in a different position. After the signature of the will by the testator, his acknowledgment will do; but by the express terms of the statute that will not do with regard to the witness. If he had said nothing at all, the putting a mark across the F might have amounted to an acknowledgment of the signature; but that will not do, and yet the facts here cannot amount to more than that": 8 H. L. Cas. 168-170.

We have been led to make a full collection and statement of the English authorities upon this point, because they have been said by those taking a different view of the law to be few in number and ill considered. An English case or two from which some assistance has been sought by way of analogy to support this will remain to be noticed.

The court of queen's bench, in *Roberts v. Phillips*, 4 El. & B. 450, held that the subscription of the witnesses need not be below the signature of the testator or the end of the will. And there is an early ruling of Lord Chief Justice Trevor to the same effect: *Peate v. Ogley*, Comyn, 197. But in each of those cases there was direct or circumstantial evidence that the names of the witnesses were signed after the testator's signature and in his presence; there is no intimation by the court that any presumption of a valid execution would arise, even after the death of the witnesses, from subscriptions so placed; and Lord Campbell, who delivered the opinion in *Roberts v. Phillips*, afterwards concurred in the judgment of the house of lords in *Hindmarsh v. Charlton*, above cited. The decision in *Roberts v. Phillips* went no further than to allow an attesta-

tion apparently insufficient to be made good by evidence that the requisites of the statute had been actually complied with. But if the signature of a witness, made before that of the testator, is allowed to be sufficient upon proof of a later acknowledgment by the witness in the testator's presence, then the witnesses may subscribe an instrument not yet signed by the testator and in his absence, with the honest intention of acknowledging their subscriptions to him after he shall have signed; his name may be signed at any time afterwards, without any witness to observe and testify whether it is affixed by him or by his authority or not, and if it is, whether he is sane or insane; and the previous subscription of the witnesses be held after his death to be evidence of a due execution and attestation, when in fact his name is forged, or at least there has been no subscription or acknowledgment by the witnesses in his presence; and so, on the loosest interpretation, no compliance with the statute.

Reference has also been made to the rule that a witness may subscribe by a mark as well as by writing his name in full. This is now well settled, both in England and in the United States: 1 Jarman on Wills, 4th Am. ed., 73, and Am. note. The counsel for the appellee asked: "If a witness may adopt what is made by another, cannot he adopt what is made by himself?" But the mark is not made by another, but by the witness himself, and has never, so far as we are informed, been held sufficient unless affixed in the presence of the testator. Even a signature of a witness's own name when his hand is guided by another person is held sufficient in England only because the witness has some share in the writing: *Re Mead*, 1 Notes of Cas. 456; *Re White*, 2 Id. 461; *Harrison v. Elvin*, 3 Q. B. 117; *Lewis v. Lewis*, 2 Swab. & T. 153. And we have seen no American decision which goes further, except that of the surrogate in *Campbell v. Logan*, 2 Bradf. 90. A subscription of the name or mark of a witness by another person in the presence of himself and the testator might possibly be a literal compliance with the statute, but not being in the handwriting of the witness, would create no presumption of a lawful execution and attestation without affirmative evidence that it was so made. In the case referred to in 3 Dane Abr. 452, in which this court held the mark of a witness a sufficient subscription, the record shows that the will of Stephen Needham was admitted to probate upon the testimony of the three witnesses to a compliance with all the statute requirements, and

among others, "that they and each of them, in the presence of the said Stephen and at his request, and in the presence of each other, subscribed the said instrument; namely," two of them "severally wrote their names at full length upon the said instrument," and the third "made a mark thereto, upon and near which and with her consent the said Stephen wrote her name at full length": *Needham v. Needham*, Essex, November term, 1802 [not reported], abstract in 3 Dane Abr. 452.

There is no direct decision in this commonwealth upon the question whether the subscription of a witness to an instrument yet unsigned by the testator and in his absence may be made good by afterwards acknowledging it in his presence. Certainly, no careful attorney or scrivener would advise or permit such an attestation and subscription. And many expressions in our books tend to show that it would be invalid. Mr. Dane recognizes the doctrine that if the testator owns his signature to the witnesses it is sufficient, but assumes that the witnesses must subscribe in his presence: 4 Dane Abr. 562, 563. In *Laughton v. Atkins*, 1 Pick. 543, 544, Chief Justice Parker, quoting *Eccleston v. Speke*, Carth. 81, said that to comply with the statute of frauds, a will must be "signed and subscribed by the witnesses in the presence of the testator." The commissioners on the Revised Statutes, in recommending that the formalities required for a will should also be required for an instrument of revocation (as the legislature accordingly did in the Revised Statutes, c. 62, sec. 6), remark that our statute of 1783, like the statute of 29 Carlos II., from which it was copied, made this difference between the two, which they italicize as follows: "The former must be attested and subscribed by three or more witnesses *in the presence of the testator*; but it is not required that *he* should sign it *in their presence*; whilst an instrument revoking a will must be signed by the testator *in the presence of three or more witnesses*, but it is not required that *they* should subscribe it in *his* presence, nor, indeed, that they should subscribe it at all." In *Dewey v. Dewey*, 1 Met. 354 [35 Am. Dec. 367], Mr. Justice Dewey said: "It can hardly be supposed that the testator, who was by his own active agency procuring the authentication of the instrument by the requisite witnesses, would have omitted the first step necessary to its due execution, viz., the signature by himself." These words are quoted with approval in *Ela v. Edwards*, 16 Gray, 91. In *Boldry v. Parris*, 2 Cush. 433, the questions whether a witness might sign before the testator, and whether an ac-

knowledge by a witness in the presence of the testator was equivalent to a subscription, were raised by counsel, but not noticed in the opinion, because there was no evidence that one of the witnesses so much as acknowledged his signature in the testator's presence.

The supreme court of Vermont, under a statute exactly like our own, except in requiring the witnesses to attest and subscribe in the presence of each other as well as of the testator, has indeed held, with the courts of England and of Massachusetts, that an acknowledgment by the testator of his signature in the presence of the witnesses is sufficient: *Adams v. Field*, 21 Vt. 256. But the same court has held that an acknowledgment by one witness, in the presence of the others and of the testator, of a signature made in the absence of one of them, is not a subscription in their presence: *Pope v. Pope*, Vt., 1864 [not reported].

The supreme court of New York, under the provisions of the English statute of 29 Carlos II., assumed it to be necessary that the witnesses should subscribe in the presence of the testator, and inferred the fact of their having so subscribed from their signatures to an ancient will, although not stated in the attestation clause: *Jackson v. Christman*, 4 Wend. 282. And in *Peck v. Cary*, 27 N. Y. 31, 32 [84 Am. Dec. 220], Chief Justice Denio quoted as entitled to great weight the opinions of Sir Herbert Jenner Fust in *Cooper v. Bockett*, 3 Curt. Ecc. 659, and other cases. The decisions cited by the appellee from Bradford's surrogate reports were made under a statute which required each attesting witness to "sign his name as a witness, at the end of the will, at the request of the testator," but omitted the requirement of earlier statutes that the witness should sign in the testator's presence: R. S. of N. Y., 3d ed., pt. 2, c. 6, sec. 32; 4 Kent's Com., 6th ed., 515; *Ruddon v. McDonald*, 1 Bradf. 352; *Vaughan v. Burford*, 3 Id. 78; *Hoysradt v. Kingman*, 22 N. Y. 372. The statute of Illinois under which the case of *Vaughan v. Vaughan*, 13 Am. Law Reg. 735, arose, had a similar omission, and only required the will to be "attested in the presence of the testator by two or more credible witnesses": Comp. Stats. of Ill. of 1856, c. 110, sec. 1. And these decisions were but of single judges in county courts of probate

The case of *Miller v. McNeill*, 35 Pa. St. 217 [78 Am. Dec. 333], to which the appellee has referred, arose under the Pennsylvania statute of 1833, providing that "every will shall be

in writing, and unless the person making the same shall be prevented by the extremity of his last sickness, shall be signed by him at the end thereof or by some person in his presence and by his express direction, and in all cases shall be proved by the oaths or affirmation of two competent witnesses." By that statute, as by the previous law of Pennsylvania from very early times, the witnesses need not subscribe at all, even to a will of real estate: *Hight v. Wilson*, 1 Dall. 94; *Rohrer v. Stehman*, 1 Watts, 463. In Delaware, under a statute like ours, it was held that the witnesses must sign in the presence of the testator, and the distinction between such a statute and that of Pennsylvania was pointed out by Chief Justice Clayton: *Rash v. Purnel*, 2 Harr. (Del.) 458; *Pennel v. Weyant*, 2 Id. 506.

In New Jersey, under a statute in terms requiring wills to be "signed by the testator in the presence of the subscribing witnesses," an acknowledgment of his signature is held insufficient: *Den v. Mitton*, 12 N. J. L. 70; *Combs v. Jolly*, 3 N. J. Eq. 625; *Mickle v. Matlack*, 17 N. J. L. 86. And in the last case Chief Justice Hornblower, who dissented on this point, as well as Mr. Justice Dayton, who concurred with the majority of the court, thought that the witnesses must sign in the presence of the testator: *Mickle v. Matlack*, 17 Id. 96, 116.

The supreme court of North Carolina, under a statute like ours of 1783, have held in at least three cases, the facts of two of which were singularly like those now before us, that a will could not be established unless the witnesses actually set their names in the testator's presence, and that, as said in the earliest case, "it was the intention of the legislature that the heirs at law should not be disinherited but by a strict compliance with the words of the act, and that the door to fraud should be completely shut": *Ragland v. Huntingdon*, 1 Ired. 561; *Graham v. Graham*, 10 Id. 269; *In re Coz's Will*, 1 Jones, 321.

In Connecticut and Kentucky it has indeed been held, under statutes not unlike our own, that a witness might sign in the presence of the testator before he signed, and acknowledge it afterwards: *O'Brien v. Galagher*, 25 Conn. 229; *Swift v. Wiley*, 1 B. Mon. 117; approved in *Upchurch v. Upchurch*, 16 Id. 113. But the only decisions which have come to our notice in which an acknowledgment by a witness to a will in the testator's presence, of a signature affixed in his absence, has been held to be an attestation and subscription in his presence, are those of a bare majority of the court of appeals

of Virginia in *Sturdivant v. Birchett*, 10 Gratt. 67, and *Parra-more v. Taylor*, 11 Id. 220. We have not overlooked the similar opinion expressed by Mr. Redfield in his learned treatise on wills, 230, 247, and in 13 Am. Law Reg. 741.

This analysis of the cases shows that, by the preponderance of American authority, as by the uniform current of the English decisions, an express requirement of statute that one person shall sign or subscribe in the presence of another is not complied with by signing in his absence and merely acknowledging in his presence. And upon full consideration, we are satisfied that in this, as in most other legal matters, reason and principle are on the side of authority and precedent.

The statute requires that the will shall "be in writing and signed by the testator," and shall be "attested and subscribed, in the presence of the testator, by three or more competent witnesses." He is not required to write his signature in their presence, but it is his will which they are to attest and subscribe. It must be his will in writing, though he need not declare it to be such. It must therefore be signed by him before it can be attested by the witnesses. He must either sign in their presence or acknowledge his signature to them before they can attest it. The statute not only requires them to attest, but to subscribe. It is not sufficient for the witnesses to be called upon to witness the testator's signature, or to stand by while he makes or acknowledges it, and be prepared to testify afterwards to his sanity and due execution of the instrument, but they must subscribe. This subscription is the evidence of their previous attestation, and to preserve the proof of that attestation in case of their death or absence when, after the testator's death, the will shall be presented for probate. It is as difficult to see how they can subscribe in proof of their attestation before they have attested as it is to see how they can attest before the signature of the testator has made it his written will. The manifest intention of the statute is that,—1. The will should be put in writing and signed by the testator; 2. His will, so written, be attested by the witnesses; and 3. The witnesses subscribe in his presence in evidence of their attestation to his written will. There is less reason for requiring the testator to sign in the presence of the witnesses than for requiring them to sign in his presence. A testator may alter his will as he pleases at any time before it is formally attested. He may write it out in full and

sign it, and it has no effect as a will until duly attested. It is unimportant whether it is or is not signed by the testator until it is produced to the witnesses. It is only important that it should be his will in writing and signed when they attest and subscribe it; and it is equally his will in writing whether signed in their presence or at some previous time. It is the will of the testator, not of the witnesses. He must know its contents, but they need not. He has the contents, as well as his signature, by which to know that it is the instrument declaring his last wishes in respect to his estate. They need see nothing but his signature and their own. To allow them to acknowledge in his presence their names signed in his absence would open a door to mistake and fraud. If the witnesses might subscribe before they had attested his signature, and even before he had signed, of what weight could their subscription be as evidence after their death that the will had been duly signed and attested? But the controlling consideration is, that the statute in terms requires, not only that the witnesses shall attest his will, but that they shall subscribe in his presence. The distinction in this respect between the signature of the testator and the subscription of the witnesses has existed in the statute law both of England and of Massachusetts for nearly two centuries, and been preserved in repeated enactments when other clauses have been altered. The court cannot presume so constant a difference in language to have been unintentional, or disregard it as immaterial.

As it appears by the testimony stated in the report that one of the attesting witnesses subscribed his name before the testator signed, and in his absence, the instrument offered for probate should have been disallowed.

Decree reversed.

! **ATTESTATION OF WILLS, GENERALLY:** See *Coffin v. Coffin*, 80 Am. Dec. 235, and *Peck v. Cary*, 84 Id. 220, and see the cases cited in the notes to both of these cases. In *Reed v. Watson*, 27 Ind. 448, the principal case is cited, and the opinion of Gray, J., that the will must be signed by the testator before it can be attested by the witnesses, is quoted. In the case of *Downie's Will*, 42 Wis. 74, 75, the principal case is cited to the point that the attestation of a will must be in the presence of the testator, and that it is not sufficient to attest the will elsewhere, and then acknowledge the attestation in presence of the testator.

RICHARDSON v. SIBLEY.

[11 ALLEN, 65.]

STREET RAILWAY CORPORATION HAS NO POWER TO MORTGAGE ITS FRANCHISE, ROAD, OR PROPERTY, without legislative authority, and a mortgage without such authority is wholly void

REPLEVIN by mortgagees of the real and personal property and franchises of a street-railroad company, to recover from defendant, a deputy sheriff, certain horse-cars and other property of such railroad company, which defendant had taken in attachment in a suit upon a debt of said railroad company.

B. F. Thomas and D. Foster, for the plaintiffs.

G. F. Hoar and T. L. Nelson, for the defendant.

By Court, GRAY, J. A corporation has no power to do any acts which the legislature has expressly or by necessary implication prohibited it from doing. A corporation, created for the very purpose of constructing, owning, and managing a railroad, for the accommodation and benefit of the public, cannot, without distinct legislative authority, make any alienation, absolute or conditional, either of the general franchise to be a corporation, or of the subordinate franchise to manage and carry on its corporate business, without which its franchise to be a corporation can have little more than a nominal existence: *Shrewsbury and Birmingham Railway v. London and Northwestern R'y*, 6 H. L. Cas. 136, 137; *York and Maryland Line R. R. v. Winans*, 17 How. 39; *Pierce v. Emery*, 32 N. H. 504, 508; *Hall v. Sullivan Railroad*, 21 Law Rep. 140, 141; S. C., 1 Brun. Col. Cas. 613; *Worcester v. Western Railroad*, 4 Met. 566; *Commonwealth v. Smith*, 10 Allen, 455, 456 [*ante*, p. 672]. Such was the opinion deliberately formed and expressed by this court in the case last cited, after able arguments, in which the authorities were fully referred to; and a mortgage by a railroad corporation of its franchise, railroad, and all other property, made without authority of the legislature, was accordingly declared to be void as against a subsequent valid mortgage to the commonwealth.

The powers of the Worcester Horse Railroad Company under its charter are quite as limited in this respect. The only powers expressly conferred are "to construct, maintain, and use a railway, with convenient single or double tracks," over such streets and highways in the city of Worcester as the mayor and aldermen may designate; and to purchase and

hold such real estate in that city "as may be convenient or necessary for the purposes and management of said road": Stats. 1861, c. 148, secs. 1, 8; 1864, c. 102. The main object of the legislature in establishing such corporations, and granting to them the privilege of using the highways in a peculiar manner, is, not the profit of the grantees, but the accommodation of the public: *Commonwealth v. Temple*, 14 Gray, 69.

Some earlier statutes had expressly authorized particular corporations of this kind to mortgage their corporate property to secure the payment of bonds issued by them; and provided that in case of failure to perform the conditions of such bonds, the property might be sold, and the purchasers, before beginning the business of managing the road, should become a corporation, with the powers and privileges, duties and restrictions, of the original corporation: Stats. 1855, c. 24; c. 408, sec. 11; 1856, c. 279; 1857, c. 278, sec. 9; 1859, c. 144, sec. 9; c. 202, sec. 13; 1861, c. 48, sec. 11; c. 147, sec. 4. And some such corporations had been in terms authorized to lease or assign their franchise and all or part of their tracks to other similar corporations: Stats. 1855, c. 338; 1857, c. 211, sec. 4; c. 216, sec. 4; c. 227, sec. 14; c. 250; 1858, c. 38, sec. 9; 1859, c. 35, sec. 2; c. 180, sec. 2; 1861, c. 48, sec. 13; c. 81; c. 89, sec. 8; c. 90, sec. 3; c. 135, sec. 8. In each of those instances the property or franchise of the first corporation would pass into the possession and management of another corporation, subject to the like legislative control as the first, not into the hands of individuals.

The charter of the Worcester Horse Railroad Company contains no express permission to make any lease, sale, or mortgage whatever. In the absence of any such controlling clause, many provisions of the charter show that the legislature contemplated the exercise of its franchise by the corporation itself. "Said tracks shall be operated and used by said corporation with horse-power only": Stats. 1861, c. 148, sec. 3. The only liability declared for injuries occasioned by neglect or misconduct in the management, construction, or use of the road, or for willfully obstructing the highway, is for the acts of the corporation, "its agents or servants," which would not naturally include agents and servants of its grantees or assignees: Stats. 1861, c. 148, secs. 4, 6. The right is given to the city of Worcester, at any time during the continuance of the charter, and after ten years from the opening of any part of the road for use, to "purchase of said corporation all the

franchise, property, rights, and furniture of said corporation" at a certain rate: Id., sec. 12; and the corporation is obliged to make annual returns to the legislature, like other railroad corporations: Id., sec. 14.

The fourteenth section of the charter also makes this corporation subject to "all general provisions of law that are or may be prescribed relative to horse or street railroads." The statute of 1864, c. 229, entitled "An act concerning street-railway corporations," declares that "street-railway companies shall have the powers and privileges, and be subject to the duties, liabilities, restrictions, and provisions, contained in this act, which, so far as inconsistent with charters heretofore granted, shall be deemed and taken to be in alteration and amendment thereof": Sec. 1. There is nothing in this statute to authorize a sale or mortgage of the franchise of any corporation which did not have the power to make one already. The statute not only embraces provisions similar to those above quoted from the charter of the Worcester Horse Railroad Company, except that authorizing the city to purchase the franchise (Id., secs. 16, 18, 24, 34, 40), but it expressly declares that "the immediate government and direction of the affairs of the corporation shall be vested in the board of the directors," and contains rules for the mode of managing its affairs by itself and its officers, not unlike those which were held by this court, in the case of *Whittenton Mills v. Upton*, 10 Gray, 596 [71 Am. Dec. 681], to be inconsistent with permitting a manufacturing corporation to make a contract of copartnership with an individual: Id., secs. 2-9; and it requires that "every such corporation shall furnish reasonable accommodations for the conveyance of passengers, and the directors may establish the rates of fare on all passengers and property conveyed or transported in its cars, subject, however, to the limitations named in its charter": Id., sec. 26.

It is true that several sections of this statute speak of any such corporation, "its lessees or assigns": Stats. 1864, c. 299, secs. 18, 22, 29, 30, 31; and section 40 requires the directors to make annual reports to the secretary of the commonwealth "of their doings under its charter," setting forth "copies of all leases and contracts made during the year with other corporations and individuals," and (as had previously been required by the General Statutes, c. 63, sec. 143) containing full information upon a great variety of items, among which are mentioned "number of mortgages on road and franchise," and

"on any other property of the corporation," and the increase or decrease of mortgage debt during the year. The form of returns here prescribed is general, to be used by all horse or street railway corporations, some of which had already received and others might afterwards obtain, grants of authority to assign, mortgage, or lease their franchise, road, or other property. One object in requiring copies of all leases and contracts made during the year may well have been to enable the commonwealth to determine whether any such corporation had exceeded the powers conferred by its charter or by other statutes, and should on that account be held to have forfeited its franchises.

That the mention of leases, assignments, and mortgages was not intended to imply any new authority to execute any such conveyance is made quite clear by the express enactment of section 24 (which is decisive of this case), that "no street-railway corporation shall lease or sell its road or property unless authorized so to do by its charter or by special act of the legislature." The manifest object of this section is to prohibit the transfer of the possession and control of the franchise and property of the corporation to any other person or corporation without authority from the legislature, by which its rights were granted and its duties imposed. The prohibition is broader and more sweeping than is applied to ordinary railroad corporations. They cannot sell their franchises, yet they may contract with each other that either shall do all the transportation over the road of the other: Gen. Stats., c. 63., sec. 115. But these are not even to do that; they are not to "sell or lease." This prohibition is not limited to alienations of their franchises, but extends to their "road or property." It is unimportant whether this word "road" is taken in its narrower and more literal sense, as describing only the tracks and rails and right of way, or in the broader and more common meaning, as including also the franchise or right of running horses and cars over them and taking fares, and the horses and cars themselves; for even if it is to be taken in the more limited meaning, the prohibition to "sell or lease its road" cannot imply a permission to transfer the franchise, without which the corporation could not carry on the business of transportation over the road, and which the corporation had previously no power to alienate. If the prohibition against alienation had been limited to the franchises only, the corporation might perhaps have disposed of the tracks and

rails, as well as of the cars, horses, and other personal property. The legislature have removed all doubt on this point by prohibiting the sale or lease of the "road or property." They have not said, and cannot be fairly understood to mean, that the corporation shall not dispose of any part of its property, of a few horses or cars, or worn-out rails, or other articles the sale or transfer of which would not impair its powers to carry on its business. But any alienation, either in fee, or for the period of its corporate existence, or for any less term, of substantially all its real and personal property, so as to disable it from carrying on the business which it had been chartered to do for the benefit of the public, is clearly within the terms and the meaning of this prohibition. It makes no difference whether the transfer is absolute or conditional, to take effect immediately upon its delivery or at some future time. A mortgage transferring a title which upon the happening of a certain contingency may be made absolute by sale or foreclosure has the effect, as soon as it becomes of any value to secure the purpose for which it was made, to accomplish as complete a transfer of the corporate franchise and property and the means of performing the corporate duty as if it had been originally an outright sale.

It was argued by one of the learned counsel for the plaintiffs that the franchise to take toll might be taken on execution, and therefore might be mortgaged. It would be more accurate to say that such a franchise could not be sold or mortgaged, and therefore could not be taken on execution, without authority of the legislature. The General Statutes, c. 68, secs. 25-34, providing a mode of attaching and taking on execution "the franchise of a turnpike or other corporation authorized to receive toll, and all the rights and privileges thereof," are mainly derived from the statutes of 1810, c. 131, which was passed shortly after the expression of a significant doubt by this court whether such a franchise could be taken on execution in the absence of express statute: *Tippets v. Walker*, 4 Mass. 596, 597. According to later authorities it could not: 2 Kent's Com., 6th ed., 284, note; Redfield on Railways, 606; *Covington Drawbridge v. Shepherd*, 21 How. 124; *Gue v. Tide Water Canal*, 24 Id. 263.

The statutes of 1864, c. 229, and the charter of the Worcester Horse Railroad Company, are public statutes, which all persons dealing with that corporation were bound to take notice of and be governed by; and the restraints thereby estab-

lished on the alienation of the franchise and property of the corporation were founded in considerations of public policy, which neither the corporation nor any other person can be allowed to evade or disregard: *Pearce v. Madison and Indianapolis Railroad*, 21 How. 443; *Zabriskie v. Cleveland etc. Railroad*, 23 Id. 398; *Whittenton Mills v. Upton*, 10 Gray, 598 [71 Am. Dec. 681]; *Commonwealth v. Smith*, 10 Allen, 459 [*ante*, p. 672]. The plaintiffs therefore acquired no title by the conveyance to them; and the creditors of the corporation could not, by taking bonds purporting to be secured by a conveyance which was void on its face, be estopped to deny its validity or to pursue the ordinary legal remedies for the collection of their debts.

It was strongly urged by the plaintiffs that even if this conveyance violated the provisions of the statutes of the commonwealth, it might still be good so far as to pass a title in the particular articles attached by the defendant. But the conveyance undertakes to assign to the plaintiffs as one subject-matter all the franchises of the corporation, and substantially all its property, real and personal, already owned or afterwards to be acquired. It manifests no intention to convey these few articles apart from the rest of the property and franchises granted; and there is no rule of law by which these articles rather than any other part of the property can be separated from the mass mentioned in the deed, and the conveyance held good as to them. The prohibition of the statute is general, that the corporation shall not alienate its property. This corporation has violated the statute by undertaking to alienate substantially all its property. If the position of the plaintiffs could be maintained, it would avail equally against an attachment of any other part of the property so illegally alienated, and the corporation might set this conveyance up in turn against every creditor seeking to attach any property of the corporation; and this conveyance being invalid, the creditors would be left without any security for their debts, or any means of enforcing them against the property of the corporation.

This conveyance, whether regarded as a mortgage or as a deed of sale in trust, being wholly void and inoperative, because made in violation of the public policy of the commonwealth as manifested in its statutes, it is unnecessary to consider particularly the nature of the instrument or the other grounds upon which the defendant has denied its validity.

Judgment for the defendant.

POWER OF RAILROAD COMPANY TO ALIENATE OR MORTGAGE its franchise or property: See the note on this topic to *Coe v. Columbus etc. R. R. Co.*, 75 Am. Dec. 549 et seq. It is held that corporations have no power to alienate their franchises and property so as to prevent the performance of the functions and duties to the public for the performance of which they were created: *Talcott v. Township of Pine Grove*, 1 Flip. 147. And the functions of a railroad company are rather the accommodation of travelers than the profit of the proprietors: *Metropolitan R. R. v. Highland R. R.*, 118 Mass. 293. And hence it is uniformly held that railroad corporations cannot, without legislative authority, transfer their franchises and rolling stock by sale or mortgage: *Talcott v. Township of Pine Grove*, *supra*; *Adams v. Boston & E. R. R. Co.*, 4 Nat. Bank. Reg. 100; *Tippicanoe Co. v. Lafayette etc. R. R. Co.*, 50 Ind. 97; *Central Nat. Bank v. Worcester*, 13 Allen, 107; *East Boston F. R. Co. v. Eastern R. R. Co.*, 13 Id. 423; *Middlesex R. R. v. Boston etc. R. R.*, 115 Id. 351; *Metropolitan R. R. v. Highland R. R.*, *supra*; *Daniels v. Hart*, 118 Id. 544; *Davis v. Old Colony R. R.*, 131 Id. 260, 271; *Ehrman v. Insurance Co.*, 35 Ohio St. 341; *Railroad Co. v. Furnace Co.*, 37 Id. 332, all citing the principal case.

LOVELL v. NELSON.

[11 ALLEN, 101.]

SURVIVOR OF JOINT DEBTORS, WHO PAYS JOINT DEBT after expiration of time when the creditor could have enforced it against the administrator of the estate of the deceased, does not thereby become entitled to maintain a claim for contribution from such administrator, nor to avail himself thereof in set-off, in an action brought against him by such administrator.

BURDEN OF PROOF IS ON DEFENDANT PLEADING SET-OFF to show that his claim filed in set-off is due from the plaintiff in the same right with the cause of action declared on in the writ; and if the plaintiff describes himself in the writ as administrator of the estate of a deceased person, and declares upon a promissory note signed by only one person, and running to him as administrator of that estate, this will not be sufficient to afford a presumption that his claim is in his representative capacity.

ACTION of contract brought on January 23, 1864, by the administrator of Alonzo Scudder's estate against Richard V. Holmes's administrator, upon a note dated October 3, 1861, given by Holmes to "Leander Lovell, administrator of the estate of Alonzo Scudder." Defendant pleaded a set-off, claiming to be allowed for a balance found due from Scudder upon his books, at his death, to Holmes, for one half of certain sums paid by him within one year past on account of debts for which Scudder and Holmes were jointly liable; and for one half of the amount paid by him in December, 1863, upon a bond to the Old Colony Insurance Company, dated in July, 1845, and signed by Scudder and Holmes. The plaintiff replied, amongst other things, that these claims were barred by

the statute of limitations. The auditor to whom the case was referred found that Scudder died in April, 1853, having before that time been in partnership with Holmes; that the plaintiff was appointed administrator of Scudder's estate on the 8th of August in that year; and that Holmes died in February, 1862, and the defendant was duly appointed administrator of his estate. Judgment went for plaintiff, and defendant appealed.

C. G. Davis, for the defendant.

E. Ames, for the plaintiff.

By Court, BIGELOW, C. J. It seems to us that there are two decisive answers to the defendant's claim in set-off.

The first is the statute of limitations. Assuming that the note declared on can be properly deemed to belong to the estate of the plaintiff's intestate, and so to be due in the same right with the claims filed in set-off, nevertheless the latter are barred by the lapse of time. The plaintiff was appointed administrator on the eighth day of August, 1853, and filed his bond on that day. He also gave due notice of his appointment in compliance with the order of the probate court, according to the provisions of the Revised Statutes, chapter 66, section 1, which were then in force. By section 3 of the same chapter it was provided that no administrator, after having given notice of his appointment as required by law, should be held to answer to the suit of any creditor of the deceased, unless it was commenced within four years from the time when he gave bond as administrator. By Gen. Stats., c. 97, sec. 5, this limitation is reduced to two years. Two of the items of set-off are claims arising out of the partnership dealings and contracts which existed between the plaintiff's intestate and the defendant's intestate, being debts of the firm paid by the latter after the decease of the former. These were clearly barred, and could not have been enforced by the original creditors of the firm as against the estate in the hands of the plaintiff as administrator at the time they were paid by the defendant. The latter, by such payment, did not acquire any new cause of action against the plaintiff's estate to which the statute bar would not apply. Any balance which might have been due to the defendant's intestate on a final settlement of the partnership concerns between him and the plaintiff's intestate was barred after the lapse of four years from the appointment of the latter as administrator, and could not

be revived by a payment of a partnership debt by a surviving copartner.

The other item of set-off is a payment of money in satisfaction of a bond on which the plaintiff's intestate was liable jointly with the defendant's intestate. It is true that the payment was made after the death of the plaintiff's intestate, and within two years from the time when the plaintiff's action was commenced. But this does not create any new cause of action, or render the plaintiff, as administrator, liable after the expiration of the time limited for bringing actions against him. If no cause of action accrued on which the defendant could be held liable as administrator within four years after his appointment, he cannot afterwards be chargeable on a cause of action subsequently accruing against the estate of his intestate. The statute bar is absolute, except when new assets come to the possession of an administrator after the period of limitation has expired, and in cases in which the judge of probate has required him to retain assets to satisfy claims of creditors whose cause of action did not accrue within such period: *Holden v. Fletcher*, 6 Cush. 235.

It is suggested by the defendant's counsel that the statute of limitations in favor of executors and administrators is only applicable to actions brought by the creditors of deceased persons, and cannot be pleaded in answer to claims filed in set-off. But this suggestion is fully met by the provision in Gen. Stats., c. 130, sec. 18, which enacts that in cases of set-off, if any limitation of actions is alleged by way of defense to the defendant's demand, the limitation shall be applied in the same manner as it would have been to an action brought on the same demand if it had been commenced at the time when the plaintiff's action was commenced. The present suit was commenced long after all the claims filed in set-off against the estate of the plaintiff's intestate were barred by lapse of time.

Another and complete answer to the claims filed in set-off is, that none of them appear to be due in the same right with the note declared on. The burden of proof is on the defendant to show this. But the evidence fails to establish the fact. It is true that the note is made payable to the plaintiff as administrator, and he is so described in the writ. But this circumstance is by no means decisive. It may nevertheless be the property of the plaintiff in his own right, and the money may be due to him personally, and not in his representative capacity. To be liable to the defendant's set-off, the note in

suit must be shown to be a debt due to the estate of the plaintiff's intestate. An executor or administrator, in lending money belonging to the estate to an individual on his promissory note only, is not acting in the execution of his trust. Such a use of the trust funds in his hands, except under unusual and extraordinary circumstances, would be inconsistent with due and faithful administration, and he would be chargeable with the money so lent, whether it was repaid by the borrower or not. In making such a loan, therefore, the inference is, that the debt is his own personal demand, and that a promise to him as executor or administrator is rather a *descriptio personæ*, used to indicate the fund from which the money was taken and to which the promisee is indebted, than as evidence that the debt is due to him in his representative capacity: *Grew v. Burditt*, 9 Pick. 265, 271. But in the present case it appears affirmatively that the plaintiff, prior to the commencement of the present action, settled his first account of administration of the estate of his intestate, and fully accounted for the whole estate in his hands. In this state of the evidence we are of opinion that it does not appear that the note declared on is due in the same right with the demands filed in set-off, and that the latter cannot be alleged by way of defense to the plaintiff's claim.

Judgment for the plaintiff.

HOOD v. HOOD.

[11 ALLEN, 196.]

DIVORCE IS VALID WHERE OBTAINED IN ILLINOIS by a citizen thereof from his wife, for the cause of desertion, upon notice to her by publication in a newspaper in the manner prescribed by the statutes of that state, although she was then living in Massachusetts under an agreement by which, after reciting their separation, he promised to pay her a certain weekly sum as long as she should remain single, and although she had no actual notice of his proceedings for a divorce, and was not in Illinois during the pendency thereof; and it is not competent for her, in a libel for divorce brought by her in Massachusetts, to offer evidence that he obtained the decree of divorce in Illinois by fraud and upon facts which would not entitle him to a divorce in Massachusetts.

LIBEL for divorce. The facts all appear in the opinion, except that after the wife left her husband and went to Massachusetts the following agreement was executed, viz.: "Somerset, March 3, 1860. I hereby agree and pledge my-

self to pay to Anna M. Hood the sum of three dollars per week so long as she shall remain single, we having separated, and this sum being allowed for separate maintenance; she is to have the sole privilege of enjoying her own property as she shall see proper, I agreeing to pay punctually the above three dollars per week at the end of every four weeks. J. M. Hood."

C. I. Reed, for the libellant.

J. Brown and C. A. Reed, for the respondent.

By Court, HOAR, J. The decision upon this libel depends upon the validity of the divorce obtained by the respondent in the state of Illinois. And that depends upon the decision of the question whether the court by which the decree of divorce was made had jurisdiction of the cause and the parties.

It appears from the report that the parties removed from Massachusetts to Illinois in 1855, and lived there together as husband and wife until February, 1859, "when the libellant, under circumstances as to which there was no evidence," returned to Massachusetts, and remained in this commonwealth up to the time of filing her libel. The respondent continued to be a citizen of the state of Illinois, and the domicile of the husband was in law the domicile of the wife: *Greene v. Greene*, 11 Pick. 410; *Harteau v. Harteau*, 14 Id. 181 [25 Am. Dec. 872]; *Barber v. Barber*, 21 How. 582. No fact appears which would show that the wife had changed her domicile in Illinois, or had any capacity to change it, when he filed his libel against her. The mere fact of her residence in this commonwealth, separate from her husband, whether with or without his consent, has no tendency to establish such a change of domicile; and there is no proof that the husband had done any act entitling the wife to a divorce, so as to affect her domicile even for the purpose of obtaining a divorce from him.

When the respondent filed his libel in Illinois, therefore, both parties had their domicile in that state, and were subject to the jurisdiction of the court in which the libel was filed. The notice given to the respondent in that suit was such as the laws of Illinois authorized in the case of an absent defendant; and such as by the laws of this commonwealth is made valid and sufficient in like cases. The decree of a court having jurisdiction of the cause and the parties is conclusive upon them.

But this libellant now alleges that the decree for divorce in

Illinois was procured by fraud; and the evidence reported has some tendency to show that the separation was by his consent, and so was not the desertion upon which his libel was founded. But the fact of desertion was conclusively settled between these parties by the judgment in Illinois; and it is not now competent for the libelant to offer evidence to contradict that judgment: *Greene v. Greene*, 2 Gray, 361 [61 Am. Dec. 454].

The provision of our statute, that "when an inhabitant of this state goes into another state or country to obtain a divorce for any cause occurring here, and whilst the parties resided here, or for any cause which would not authorize a divorce by the laws of this state, a divorce so obtained shall be of no force or effect in this state" (Gen. Stats., c. 107, sec. 54; R. S., c. 76, sec. 39), has no application to the case before us, because, when the respondent first went to Illinois, there is no evidence that he had any intention of procuring a divorce; and when he returned to Illinois in 1860 he was not an inhabitant of Massachusetts. "In all other cases, a divorce decreed in any other state or country according to the laws thereof, by a court having jurisdiction of the cause and both the parties, shall be valid and effectual in this state": Gen. Stats., c. 107, sec. 55.

The divorce which the respondent obtained in Illinois is therefore a bar to the maintenance of this libel.

Libel dismissed.

JURISDICTION TO DECREE DIVORCE: See the notes to *Hanover v. Turner*, 7 Am. Dec. 206-209; *Tolen v. Tolen*, 21 Id. 747-752; and see *Hubbell v. Hubbell*, 62 Id. 702. The principal case is cited in *Burlen v. Shannon*, 115 Mass. 449, and *Ross v. Ross*, 129 Id. 248, to the point that a decree of divorce rendered in another state in which the domicile of the parties is at the time and according to its laws, even for a cause not a ground of divorce by the laws of Massachusetts, will be held valid in the latter state, even though the marriage took place there.

COMMONWEALTH v. WAITE.

[11 ALLEN, 264.]

STATUTE MAKING IT CRIMINAL OFFENSE TO SELL MILK WHICH IS ADULTERATED, though with pure water only, is constitutional.

CERTIFICATE OF RESULT OF ANALYSIS OF MILK BY SWORN INSPECTOR, appointed under the Massachusetts statute, is admissible in evidence in a criminal prosecution, provided he also testifies at the trial to the same facts which are stated therein; and in such case, the admission of the certificate in evidence before he testifies furnishes no ground for a new trial, after a verdict of guilty.

INDICTMENT for selling adulterated milk. The opinion states the facts.

J. F. Pickering, for the defendant.

Reed, attorney-general, for the commonwealth.

By Court, CHAPMAN, J. It has been settled that it is an offense against the statute of 1864, chapter 122, to sell milk adulterated by water, and that guilty knowledge on the part of the seller need not be alleged or proved: *Commonwealth v. Farren*, 9 Allen, 489; *Commonwealth v. Nichols*, 10 Id. 199.

The defendant in this case contends that the statute is unconstitutional, because it is in derogation of common right. The substance of the argument is this: It is innocent and lawful to sell pure milk, and it is innocent and lawful to sell pure water; therefore the legislature has no power to make the sale of milk and water, when mixed, a penal offense, unless it is done with a fraudulent intent. But it is notorious that the sale of milk adulterated with water is extensively practiced with a fraudulent intent. It is for the legislature to judge what reasonable laws ought to be enacted to protect the people against this fraud, and to adapt the protection to the nature of the case. They have seen fit to require that every man who sells milk shall take the risk of selling a pure article. No man is obliged to go into the business; and by using proper precautions, any dealer can ascertain whether the milk he offers for sale has been watered. The court can see no ground for pronouncing the law unreasonable, and has no authority to judge as to its expediency.

The second section provides for the appointment of inspectors of milk, to analyze or test milk, and make and record a certificate of the result; and it further provides that such certificate, when sworn to, shall be admissible in evidence in all prosecutions under the act. A certificate of Dr. White, who was an inspector, was admitted in evidence in this case, and it is objected that the legislature had no power to make it evidence in a criminal case. But it further appears that he was a witness in the case, and testified to all the facts set forth in the certificate. We think this destroys the force of the objection, whatever it might have been otherwise.

Exceptions overruled.

LEGISLATURE MAY PASS LAWS AMOUNTING TO REASONABLE POLICE REGULATIONS: See *Redmond v. State*, 36 Ark. 62. And persons are bound to know and obey such laws at their peril: Id.; *Commonwealth v. Raymond*, 97 Mass.

569; *Commonwealth v. Emmons*, 98 Id. 8; *Houigan v. Nowell*, 110 Id. 473; *Commonwealth v. Adams*, 114 Id. 324; *State v. Hartford*, 24 Wis. 61, all citing the principal case. In *Commonwealth v. Evans*, 132 Mass. 11, it was held, the case being a prosecution for adulterating milk, that the prosecution was not bound to prove that defendant knew that the milk was adulterated. If he sold adulterated milk, he was guilty under the statute.

LEVI v. LYNN AND BOSTON RAILROAD COMPANY.

[11 ALLEN, 300.]

IN ACTION AGAINST STREET-RAILROAD COMPANY TO RECOVER DAMAGES for the loss of a box of merchandise delivered to it to be carried for hire on the front platform of one of its cars, evidence that other persons had paid money to its conductors, with the knowledge of its superintendent, for the carriage of merchandise, is admissible to show the defendant to be a common carrier of goods.

STREET-RAILWAY COMPANY, IF PROVED TO BE COMMON CARRIER OF GOODS, is liable as such for loss of a box of merchandise delivered to it to be carried for hire on the front platform of one of its cars.

TORT against street-railway company to recover box of merchandise alleged to have been delivered to the company for carriage as a common carrier. The defendant claimed not to be a common carrier. The remaining facts appear in the opinion.

D. Peabody, for the defendants.

A. Hemenway, for the plaintiff.

By Court, COLT, J. The plaintiff resorted to the usual and proper mode of proving that the defendants had assumed the business of common carriers of merchandise upon their cars, and produced evidence that two other persons had paid money at other times to the defendants' conductors for the transportation of merchandise, with the knowledge of the superintendent of the road. For anything that appears to the contrary in the exceptions, it may have been proved that these two other persons had so employed the defendants in repeated instances. The evidence was entirely proper to go to the jury, and in the absence of anything to control or contradict it, would be sufficient to warrant them in finding that the defendants had assumed to be and were common carriers when the plaintiff's box was delivered to them for transportation.

The jury were, in effect, instructed that if they found that the defendants were common carriers, and that the plaintiff's box was delivered to them for transportation, and the price of

transportation paid by her, they would be responsible for the delivery of the box at its place of destination. And these instructions were sufficiently correct and accurate.

If the defendants were proved to be common carriers, the law supplies the proof of the contract so far as regards the extent and degree of liability, and the bailor having proved delivery to a carrier and loss, the burden is on the carrier to discharge himself from liability, within the exceptions which the law creates. No question seems to have been raised or instructions required in regard to the limit of the defendants' liability in this case, if regarded as common carriers: *Clark v. Barnwell*, 12 How. 272; *Alden v. Pearson*, 3 Gray, 342.

The question whether the plaintiff was herself negligent in placing her property on the front platform of the car, and the point that she did not in fact part with the custody of the box, and so cannot charge the defendants with her loss, are not open to the defendants upon these exceptions, for it does not appear that any such question was raised or point made at the trial: *Brigham v. Wentworth*, 11 Cush. 123; *Reed v. Call*, 5 Id. 14; *Moore v. Fitchburg R. R.*, 4 Gray, 465 [64 Am. Dec. 83].

Exceptions overruled.

VINTON v. MIDDLESEX RAILROAD COMPANY.

[11 ALLEN, 304.]

CONDUCTOR OF STREET-RAILWAY CAR MAY EXCLUDE OR EXPEL THEREFROM person whose condition, by reason of intoxication or otherwise, is such that it is reasonably certain that by act or speech he will become offensive or annoying to other passengers therein, although he has not committed any act of offense or annoyance.

TORT against street-railway company for damages for the act of the conductor of one of its cars in expelling therefrom the plaintiff, who was one of its passengers. On the trial the defendants introduced evidence tending to show that at the time of the expulsion the plaintiff was intoxicated, and used loud, boisterous, profane, and indecent language towards the conductor, and attempted to strike him, and that he was therefore expelled. But the evidence on this point was conflicting. There were four women in the car as passengers. There was no evidence that any rule or regulation had ever been adopted by the defendants authorizing their conductors to expel pas-

sengers for any cause. The court instructed the jury that "if plaintiff, by reason of intoxication or otherwise, was, in act or language, offensive or annoying to the passengers, the conductor had a right to remove him, using reasonable force. If the conductor, in the performance of his service as conductor, forcibly removed the plaintiff without justifiable cause, or if, having justifiable cause, he used unnecessary and unreasonable violence in kind or degree in removing him, the defendants are liable." Verdict for plaintiff for one thousand dollars. Defendants alleged exceptions.

L. M. Child and L. Child, for the defendants.

T. H. Sweetser and W. S. Gardner, for the plaintiff.

By Court, BIGELOW, C. J. By the instructions under which this case was submitted to the jury, in connection with the refusal of those which were asked for by the defendants, we are led to infer that the learned judge who presided at the trial was of opinion that the defendants and their duly authorized agents had no legal power or authority to exclude or expel from the vehicles under their charge a passenger whose condition and conduct were such as to give a reasonable ground of belief that his presence and continuance in the vehicle would create inconvenience and disturbance and cause discomfort and annoyance to other passengers. Such certainly were the result and effect of the rule of law laid down for the guidance of the jury at the trial. We are constrained to say that we know of no warrant, either in principle or authority, for putting any such limitation on the right and authority of the defendants as common carriers of passengers, or of their servants acting within the scope of their employment.

It being conceded, as it must be under adjudicated cases, that the defendants, as incident to the business which they carried on, not only had the power but were bound to take all reasonable and proper means to insure the safety and provide for the comfort and convenience of passengers, it follows that they had a right, in the exercise of this authority and duty, to repress and prohibit all disorderly conduct in their vehicles, and to expel or exclude therefrom any person whose conduct or condition was such as to render acts of impropriety, rudeness, indecency, or disturbance either inevitable or probable. Certainly the conductor in charge of the vehicle was not bound to wait until some overt act of violence, profaneness, or other misconduct had been committed, to the inconvenience or

annoyance of other passengers, before exercising his authority to exclude or expel the offender. The right and power of the defendants and their servants to prevent the occurrence of improper and disorderly conduct in a public vehicle is quite as essential and important as the authority to stop a disturbance or repress acts of violence or breaches of decorum after they have been committed, and the mischief of annoyance and disturbance have been done.

Indeed, if the rule laid down at the trial be correct, then it would follow that passengers in public vehicles must be subjected to a certain amount or degree of discomfort or insult from evil-disposed persons before the right to expel them would accrue to a carrier or his servant. There would be no authority to restrain or prevent profaneness, indecency, or other breaches of decorum in speech or behavior until it had continued long enough to become manifest to the eyes or ears of other passengers. It is obvious that any such restriction on the operation of the rule of law would greatly diminish its practical value. Nor can we see that there is any good reason for giving so narrow a scope to the authority of carriers of passengers and their agents as was indicated in the rulings at the trial. The only objection suggested is, that it is liable to abuse, and may become the instrument of oppression. But the same is true of many other salutary rules of law. The safeguard against an unjust or unauthorized use of the power is to be found in the consideration that it can never be properly exercised except in cases where it can be satisfactorily proved that the condition or conduct of a person was such as to render it reasonably certain that he would occasion discomfort or annoyance to other passengers, if he was admitted into a public vehicle or allowed longer to remain within it.

Exceptions sustained.

RIGHT OF RAILROAD COMPANY TO EXCLUDE PERSONS BECAUSE OF APPREHENDED DANGER. — A railroad company cannot refuse to carry passengers upon regular trains except for good cause. But they need not receive persons whose conduct is such that it furnishes reasonable ground for the belief that they will annoy and offend other passengers. Thus they are not bound to receive a person who is so drunk as to justify the conductor to believe that he will misbehave and annoy other passengers: *Murphy v. Union R'y Co.*, 118 Mass. 230, citing the principal case; and if he is allowed to ride, and becomes boisterous, flourishing a knife, and doing other acts of the kind, he may be ejected from the car: *Railway Co. v. Valley Co.*, 32 Ohio St. 345, 351, citing the principal case; *Murphy v. Union R'y Co.*, 118 Mass. 230; but a conductor cannot refuse to allow a person to ride merely because

he is slightly intoxicated, if he shows no signs that he will not conduct himself properly: *Pittsburgh etc. R. R. Co. v. Vandyne*, 57 Ind. 576. A railroad company may refuse to carry a woman whose reputation is so notoriously bad that it furnishes ground for the belief that her conduct will be offensive to other passengers; but she cannot be excluded merely because of her unchastity, if her conduct is good and demeanor ladylike: *Brown v. Memphis R. R. Co.*, 7 Fed. Rep. 51, citing the principal case. So it is proper to refuse to carry one whose person or clothing is filthy or disgusting, or who is affected with a contagious disease, or is infested with vermin: *Walsh v. Chicago etc. R. R. Co.*, 42 Wis. 23. A railroad company need not carry a gambler who seeks to board the train for the purpose of plying his vocation: *Thurston v. Union Pac. R. R. Co.*, 4 Dill. 321; though it is held in this case that unless it is evident that such is the purpose of the person seeking passage, the company cannot refuse to carry him merely because he is a gambler; and it is said that the question whether he has or has not such intention is a question for the jury.

THE PRINCIPAL CASE IS CITED to the point that railroads may reasonably regulate the conduct of passengers on trains, and in that regard may set apart a special car for ladies and their escorts, and may exclude other passengers from such car if there are seats elsewhere in the train: *Base v. Chicago and Northwest R. R. Co.*, 36 Wis. 450, 463.

LE BARRON v. EAST BOSTON FERRY COMPANY.

[11 ALLEN, 312.]

FERRY COMPANY, AS COMMON CARRIER OF PASSENGERS, IS BOUND TO FURNISH reasonably safe and convenient means for the passage of teams from its boats, appropriate to the nature of its business, and to exercise the utmost skill in the provision and application of the means so employed; but it is not bound to adopt and use a new and improved method because it is safer or better than the method then employed if it is not requisite to the reasonable safety or convenience of passengers, and if the expense is excessive.

NO PRESUMPTION OF NEGLIGENCE ON PART OF DEFENDANT IS RAISED BY PROOF MERELY OF DUE CARE on the part of plaintiff, and of the injury, in an action against a ferry company to recover damages for injury sustained by its negligence in failing to provide a safe and sufficient means of passage from its boat; nor will such proof shift the burden which rests upon the plaintiff to prove defendants' negligence; but all the evidence may be taken into consideration by the jury, and allowed such weight as they think reasonable.

TORT against a ferry company for damages for a personal injury sustained by plaintiff while driving his team from defendants' boat. The facts are sufficiently stated in the opinion.

G. H. Kingsbury, for the plaintiff.

G. A. Somerby, for the defendants.

By Court, COLT, J. The claim of the plaintiff that the failure of the defendants to adopt the new supplemental or adjusted drop, which had been adopted and used by another ferry company, with the knowledge of the defendants, constituted negligence, and made them liable for the plaintiff's injury, cannot be sustained, although it was proved that such new drop obviated all liability to the accident which caused his injury. The question of negligence was a question upon all the evidence for the jury, and we think it was submitted to them under full and accurate instructions.

A common carrier of passengers contracts in law that the kind of conveyance which he adopts shall be a reasonably safe and convenient mode of transportation, for its kind. The modes of conveyance in use by passenger carriers, both by land and water, vary as the exigencies of the traffic and its remunerative character require and justify. To require all carriers to adopt alike expensive provisions for the safety of passengers, without reference to the nature of their employment or the amount of their business, would be impracticable and absurd. It would be like requiring all the public highways in the commonwealth to be kept in a like state of repair, without reference to the nature of the country through which they pass, or the amount of travel they accommodate. The different kinds of ferries in use vary from the rudest form of boat, drawn from shore to shore by ropes, propelled by oars or horse-power, or the current of the stream, with landing-places on the banks, to those expensive steamboats which ply between populous districts, provided with every convenience of access from docks and ferry-houses. It cannot be necessary, in order to protect themselves from liability, that all these different ferry-men should adopt those appliances which can be shown to be the safest, and which others in the same occupation use. And yet the rule contended for by the plaintiff would require every ferry-man, without regard to the nature or amount of his business, to use the most improved mode of securing the safety of passengers, regardless of expense, if thereby a liability to injury peculiar to the mode adopted by him could be avoided, either in the transportation or in the means provided for entrance upon or exit from his boat.

This whole matter of negligence is for the jury, and is and should be affected by the nature of the transportation which the carrier has undertaken to afford, and the amount and character of his business. If the means of transportation are

adapted to the reasonably safe carriage of passengers upon that particular kind of conveyance, and he exercises the utmost skill in the use of such means, he has discharged his legal obligations.

The case of *Hegeman v. Western R. R.*, 13 N. Y. 9 [64 Am. Dec. 517], cited by the plaintiff, was an action for an injury sustained by a passenger and caused by the breaking of an axle. There was evidence that a safety-beam, then in use on many other railroads, would secure safety in case of such an accident; and although this means of safety was adopted by carriers engaged in precisely the same kind of transportation with the defendants, yet the judge charged the jury that if they should be of opinion that a safety-beam was designed and calculated to prevent an injury to passengers in case of the breaking of an axle, it did not necessarily follow that the defendants were liable because they had not adopted it, but it would be for the jury to say whether the defendants were or were not negligent in informing themselves of the necessity and utility of the invention, and availing themselves of it.

The plaintiff further asked the court to rule that, having proved due care on his part, and the occurrence of the accident, the law would imply negligence on the part of the defendants, and cast upon them the burden of proving that the accident happened without their fault. We think such instruction would have been erroneous, as applied to the case as presented upon the pleadings and evidence. The declaration alleges that the negligence of the defendants consisted in not providing safe exit for the plaintiff with his loaded wagon from their ferry-boat, so that in attempting to pass off the boat the wheels of the wagon struck violently against the drop of the ferry, and threw the load upon the plaintiff, causing the injury complained of.

The general rule that the plaintiff, in actions of this description, is bound to prove negligence on the part of the defendants as the cause of the injury, has been apparently modified in a class of cases in which it is said that proof of due care on the part of the plaintiff, with proof of the accident, is *prima facie* evidence of negligence on the part of the defendants. An examination of these cases, we think, will show that there is in them no real invasion of the general rule as to the burden of proof. It will be found, we believe, in all of them that the nature of the accident was such, or the attending circumstances such, that proof of the accident alone raised a presumption

of negligence, and that the same evidence which proved the injury done also proved the defendants' negligence, or developed circumstances from which it must be presumed. Thus in *Carpue v. London and Brighton Railway*, 5 Q. B. 747, where the injury was caused by a train running off the track and overturning the carriage in which the plaintiff was a passenger, Denman, C. J., told the jury that, "it having been shown that the exclusive management of the machinery and the railway was in the hands of the defendants, it was presumable that the accident arose from their want of care, unless they gave some explanation of the cause." So in *Stokes v. Saltonstall*, 13 Pet. 181, the injury was occasioned by the overturning of a stage-coach; and in *Ware v. Gay*, 11 Pick. 106, the accident was of a similar nature, occasioned by the running off of the wheel of the coach in which the plaintiff was a passenger. In these cases, clearly, the nature of the accident afforded proof of the defendants' negligence.

The plaintiff, in proving his injury, must ordinarily prove the nature of the accident and the circumstances; and when such proof has any tendency to prove negligence, and especially when the defendant has exclusively the means of knowledge within his control, as to what caused the injury, it is said the burden is cast upon the defendant to explain the cause, and exculpate himself.

Upon recurring to the facts in this case, it appears that this accident might have happened without negligence on the part of the defendants, and that the means of knowledge as to the cause of the injury were equally within the reach of both parties. The court therefore rightly declined to give the instructions asked for upon this point, and for the reasons stated, the instructions which were given were sufficiently favorable to the plaintiff.

Exceptions overruled.

DUTIES AND LIABILITIES OF KEEPER OF PUBLIC FERRY. — Public ferry-men are common carriers, and liable not only for gross negligence, but for all losses except such as are occasioned by the act of the person employing them, the act of God, and the enemies of the country: *Cohen v. Hume*, 1 McCord, 444; *Pomeroy v. Donaldson*, 5 Mo. 36; *Babcock v. Herbert*, 3 Ala. 392; *May v. Hanson*, 5 Cal. 360; *Fisher v. Clisbee*, 12 Ill. 344; *Slimmer v. Merry*, 23 Iowa, 90; *Wilson v. Hamilton*, 4 Ohio St. 722; *Smith v. Seward*, 3 Pa. St. 342; *Sanders v. Young*, 1 Head, 219; *Albright v. Penn*, 14 Tex. 290. This liability extends only to such property as is received in the capacity of common carrier: *Harvey v. Rose*, 26 Ark. 3. A ferry-man is not a common carrier of property retained by the passenger in his exclusive control: *Harvey v. Rose*,

supra; *Evans v. Rudy*, 34 Id. 383; *Wyckoff v. Queen's Co. F. Co.*, 52 N. Y. 32. But the mere fact that the owner went with the goods or property does not release the carrier. There need, of course, be no special agreement releasing the ferry man, but it must appear that the owner retained the exclusive possession, and that the care of property was never surrendered to the ferryman: *Harvey v. Rose*, 26 Ark. 3. A ferry-man who carries property gratuitously is liable only for gross negligence: *Dudley v. Camden & P. F. Co.*, 42 N. J. L. 25; S. C., 36 Am. Rep. 501. A miller who keeps and manages a ferry for the convenience of his customers, and makes no charge for ferriage, is not a common carrier, and is bound only to ordinary diligence: *Self v. Dunn*, 42 Ga. 528. A person who constructs and maintains a ferry, though not opened or maintained by public authority, if he undertakes for hire to carry all who come, is a common carrier, and whether he does so undertake is a question for the jury: *Littlejohn v. Jones*, 2 McMull. 365. The landlord of a ferry, rented and occupied by a tenant, is not liable for losses occasioned in the conduct of the ferry: *Ladd v. Chotard*, Minor, 366; *Fellon v. Deall*, 22 Vt. 170; *Briggs v. Farrell*, 12 Ired. 1; *Rutherford v. McGowan*, 1 Nott & McC. 17. One managing a ferry on shares is considered a servant of the owner, and not liable for losses: *Taylor v. Rushing*, 3 Stew. 160.

Duties of Keeper of Ferry. — A ferry company must use due diligence and provide suitable means of transportation: *Jabine v. Midgett*, 25 Ark. 475; including fastenings, boats, landings, fixtures, etc.: *Whitmore v. Bowman*, 4 G. Greene, 148. The ferry-man is the legal judge of when it is safe to pass over: *Cohen v. Hume*, 1 McCord, 444; *Miles v. James*, 1 Id. 157; *Rutherford v. McGowan*, 1 Nott & McC. 17. He should accommodate passengers at all reasonable hours and without unnecessary delay: *Jabine v. Midgett*, 25 Ark. 475; and it is held in *Pate v. Henry*, 5 Stew. & P. 101, that the ferry-man, in the absence of any excuse, must transport persons across the stream after night-fall. Where a party assumes to act as ferry-man without a license, he cannot take advantage of his own wrong to avoid the responsibility attaching to such calling: *Polk v. Coffin*, 9 Cal. 56. A right to sue on the statutory bond of a ferry-keeper does not preclude resort to the common-law action for negligence: *Wells v. Steele*, 31 Ark. 219.

Liability concerning Passengers. — It is held that a bridge which can be raised and lowered with the tide, so as to be brought to the level of the boat, must be provided: *Hasman v. Hoboken L. & I. Co.*, 2 Daly, 130; and where a vacant space was left between the boat and bridge, in which the passenger's foot was caught and crushed, the ferry company was held liable: *New Jersey R. R. Co. v. Palmer*, 33 N. J. L. 90. Placing a log at the threshold of its gate against which passengers will stumble in the dark, no light being provided, is negligence: *Osborn v. Union Ferry Co.*, 53 Barb. 629. It is negligence to let down the bridge, and permit passengers to go upon it before the vessel is secured: *Ferris v. Union F. Co.*, 36 N. Y. 316; or to allow a vessel to leave the dock before the gate by which passengers entered was securely fastened: *Cleveland v. N. J. Steamboat Co.*, 5 Hun, 523. Where a boy fell through the guards of a pontoon used for landing, and constructed as such pontoons ordinarily are, the ferry company was held not liable for his death: *Loftus v. Union F. Co.*, 22 Id. 33; S. C., 84 N. Y. 455; 38 Am. Rep. 533. It is not necessarily contributory negligence to stand in the bow of a boat when landing: *Beverly v. Boston*, 136 Mass. 336; S. C., 49 Am. Rep. 37; nor to stand near a chain so as to be injured thereby by being thrown down by the shock of the boat striking the bridge: *Gannon v. Union F. Co.*, 29 Hun, 631; nor to step into the carriage-way if crowded into it by other passengers:

Hasman v. Hoboken F. Co., 2 Daly, 130. A ferry company is not liable where a passenger fell overboard in attempting to recover his hat, which had blown off: *Dungan v. Champlain T. Co.*, 56 N. Y. 1.

Plaintiff need not prove the exercise of ordinary care on his own part, but the burden of proving his want of it lies on the defendant: *May v. Hanson*, 5 Cal. 360. In Massachusetts, plaintiff, in order to recover, must prove want of care on defendant's part: *Joy v. Winnisimmet Co.*, 114 Mass. 63.

Liability concerning Goods. — The ferry-keeper should make proper provision to receive property for transportation, and is liable for loss occasioned by his default in this regard: *Richards v. Fugua*, 28 Miss. 792. It is said, concerning a team, that as soon as it is upon the drop or slip, it is in the ferryman's possession, and he will be liable for any subsequent damage to it: *Cohen v. Hume*, 1 McCord, 439. Barriers to prevent horses from running overboard should be provided: *Miles v. James*, 1 Id. 157. It is negligent to order teams to pass off the boat before the bridge has been properly adjusted: *Hasman v. Hoboken F. Co.*, 50 N. Y. 53. Where a horse backs against the rear chain, which breaks from a defect, and the horse is drowned, the ferry company is liable: *Clark v. Union F. Co.*, 35 Id. 485. Where one retains possession of the property himself, it is not at the sole risk either of the owner or ferry-keeper, for if injured by the negligence of the ferry-man solely, he must respond in damages. But in such cases, the ferry-man is liable only for actual negligence: *Evans v. Rudy*, 34 Ark. 383; *Wilson v. Shultin*, 6 Jones, 375; *Wyckoff v. Queens F. Co.*, 52 N. Y. 32. Where a party drove high-spirited horses on a boat, and without calling for assistance of ferry-men, stepped out of reach of the lines for the purpose of blanketing the animals, and they became scared and ran overboard, it was held that the ferry-man was not liable, in the absence of proof of his negligence: *Dudley v. Camden & P. F. Co.*, 42 N. J. L. 25; S. C., 36 Am. Rep. 501. So where the owner's act contributed to the injury, it is held that he cannot recover, as where he drove his horse from the boat, and in doing so, by reason of his lack of care, the animal was injured: *Yerkey v. Sabin*, 97 Ind. 141; S. C., 49 Am. Rep. 434; *Dudley v. Camden & P. F. Co.*, 45 N. J. L. 368. In an action for loss of property shipped, the burden is on the ferry-man to prove that the loss resulted from inevitable accident, or that the shipper undertook to care for the property himself: *Powell v. Mills*, 37 Miss. 691. The measure of damages has been held to be the value of the property, with compensation for actual expenses and loss of time: See *Evans v. Rudy*, 34 Ark. 237.

THE PRINCIPAL CASE IS CITED to the point that it is not sufficient for plaintiff to prove his own care, in an action against a carrier, but that he must show some omission on the part of the carrier, except in the cases where negligence is necessarily inferred from the happening of the injury alone: *Case v. Boston & L. R. R. Co.*, 14 Allen, 457; *Fetall v. Middlesex R. R. Co.*, 109 Mass. 406; *Duffy v. Upton*, 113 Id. 548; *Hutchinson v. Boston G. L. Co.*, 122 Id. 220.

HAVEN v. WINNISIMMET Co.

[11 ALLEN, 377.]

UPON SUBMISSION OF DISPUTE TO TWO PERSONS WITH AUTHORITY IN CASE OF DISAGREEMENT to choose a third person, the award of whom or a majority of whom, in case a third person shall be chosen, shall be final; if the two arbitrators, being unable to agree as to the amount of damages, appoint a third person "as umpire to act with us in the hearing and final decision thereof in the manner contemplated in said agreement," and the person so chosen, after a new hearing before all three of them, makes to the parties a written statement of his decision, which shows that he arrived at it without consultation with the other arbitrators, and that he did not consider it to be his duty to fix independently the amount of damages to be awarded, but only to determine which of the others had fixed the sum nearest in his judgment to justice and equity, and he accordingly unites with the arbitrator who fixed the highest sum, and those two make an award of damages, by a separate paper, which does not show that the other arbitrator acted at all in the case, such award is void, although such third person declares his own opinion that the sum awarded is too small.

DISTINCTION BETWEEN SUBMISSION TO ARBITRATORS WITH POWER TO REFER TO UMPIRE, and submission to arbitrators with authority to choose another to act with them, stated.

ACTION upon an award. The opinion states the facts.

G. A. Somerby, for the plaintiff.

P. W. Chandler and J. B. Thayer, for the defendants.

By Court, BIGELOW, C. J. It is impossible to maintain this award. It cannot be supported either as an award of arbitrators or as the award of an umpire.

In the first place, the parties did not agree to submit the subject-matter of difference between them to the determination of an umpire, in case of a failure to agree by the arbitrators named in the submission. An umpire is a person whom two arbitrators, appointed and duly authorized by parties, select to decide the matter in controversy, concerning which the arbitrators are unable to agree. His province is to determine the issue submitted to the arbitrators on which they have failed to agree, and to make an award thereon, which is his sole award. Neither of the original arbitrators is required to join in the award in order to make it valid and binding on the parties. In the absence of any agreement or assent by the parties to the controversy, dispensing with a full hearing by the umpire, it is his duty to hear the whole case, and to make a distinct and independent award thereon, as the result of his judgment. He stands, in fact, in the same situation as a sole

arbitrator, and he is bound to hear and determine the case in like manner as if it had been originally submitted to his determination: *Watson on Arbitration*, 3d ed., 100; *McKinstry v. Solomons*, 2 Johns. 57; S. C., 13 Id. 27; *Bates v. Cooke*, 9 Barn. & C. 407; *In re Salkeld and Slater*, 12 Ad. & E. 767; *Passmore v. Pettit*, 4 Dall. 271.

By the terms of the submission in the present case, it is clear that the parties did not intend that the arbitrators whom they appointed should select an umpire. The agreement is explicit that in case of disagreement by the arbitrators they should appoint a third person, and that the award of the majority of the three should be final. This excludes the power of appointing an umpire, whose sole award was to be valid and binding, and necessarily implies that the third person to be selected in case of disagreement was to be a third arbitrator, whose power is expressly limited to making an award in conjunction with the other two, or one of them.

There can be no doubt, therefore, that the arbitrators mistook their authority in appointing a third person to act as umpire. No such power was delegated to them by the submission. But this error might not have been fatal to the award if it had appeared that the third person whom the arbitrators selected as umpire had in fact acted with them in hearing and deciding the case, exercising a free and independent judgment, and uniting with one of them in the award. It appears, however, that he entirely misunderstood the authority which was vested in him by the appointment under which he acted, and that he did not take on himself the performance of the functions either of an arbitrator or an umpire. In either capacity, it was his clear duty to hear the evidence adduced by both parties, and their respective allegations and arguments, and thereupon, acting fairly and impartially, to form his own independent judgment on the case before him. This he did not do. On one of the main issues involved in the controversy between the parties which formed the subject-matter of the submission, it is shown that he studiously refrained from acting on his own opinion of the merits of the case. His own statement puts this fact beyond dispute. He says that he did not consider "that by the terms of the agreement by which the parties submitted this case to him as umpire, he has himself any authority to fix the amount of damage to be awarded, but that his duty is only, after a full hearing and due consideration of the case, to determine which of the two referees have fixed

upon the sum nearest, in his judgment, to justice and equity." And then, after assigning reasons for his conclusion, he adds: "The undersigned is therefore compelled to unite with the referee selected by the plaintiff, who has fixed the amount of damages to be awarded at the sum of three thousand dollars." From this language it is apparent that he mistook the capacity in which he was alone authorized to act under the submission, and also that he entirely misconceived the duty which devolved on him, acting either as an umpire or as an arbitrator. It was in the latter capacity only that he had authority to act. But he did not exercise the authority. Not only is it clear that the amount of damages awarded is not the sum which he would have given if he had supposed he was authorized to allow a different amount, but it is also manifest that he did not enter into consultation with the other arbitrators concerning the facts of the case, nor permit himself to exercise his own independent judgment, either in consulting with them or in making up his award. Besides, the inference is unavoidable, from his statement, that he did not suppose that he was authorized to enter into a general examination of all the facts involved in the issue, and to form a judgment on the question of the liability of the defendants to pay any damages to the plaintiff's testator, but that he felt constrained by the terms of his appointment to confine himself to the amount of damages which the plaintiff was entitled to recover.

The insuperable difficulty, therefore, in the way of maintaining an action on this award, is not only that it appears that the third person selected by the parties exceeded his authority under the submission, by acting as umpire, but that he wholly failed properly to discharge the functions of arbitrator. The award cannot be regarded as being valid on the ground that he acted in the latter capacity, because he did not consult with the other two arbitrators on the whole case, nor did he pass on all the questions at issue between the parties, or exercise his own independent judgment on the matter concerning which he undertook to make an award. It is impossible for any one now to say what his opinion or judgment would have been if he had acted as arbitrator, and had duly considered the whole case in consultation with the other arbitrators.

It is true that he says he should have been willing to allow a greater sum in damages than is given by the award if the arbitrator appointed by the plaintiff had fixed on a

higher sum. But this affords no argument in support of the award, because it cannot now be known that such would have been his opinion and judgment if he had performed it fairly and impartially, after due deliberation and consultation with the other two arbitrators, with both of whom he was authorized and bound to act in arriving at a conclusion on the case submitted.

Judgment for the defendants.

DEFINITION OF UMPIRE as laid down in the principal case is adopted in *Ingraham v. Whitmore*, 75 Ill. 30.

DODD v. FARLOW.

[11 ALLEN, 426.]

BROKER HAS NO IMPLIED AUTHORITY, FROM USAGE OF TRADE, TO WARRANT GOODS SOLD by him to be of merchantable quality; and evidence to prove such usage is inadmissible, and a memorandum made by such broker of a contract for the sale of goods is invalid and inadmissible in evidence, if he has inserted therein, without express authority, a warranty by the seller that such goods are of merchantable quality.

CONTRACT to recover damages for non-delivery of certain goods. It appears that the broker for defendants sold to plaintiffs certain skins, and entered in his book a memorandum of the sales, taking their demand notes for the price. Both in the memorandum and in the notes was inserted a warranty that the goods were to be of merchantable quality. Defendants contended that they did not authorize the broker to sell otherwise than for cash, nor to so warrant the goods, and they refused to deliver the skins. Plaintiffs claimed that an existing usage of the trade gave the broker implied authority to make such warranty. The remaining facts appear in the opinion.

H. W. Paine and R. D. Smith, for the defendants.

C. A. Welch, for the plaintiffs.

By Court, BIGELOW, C. J. We do not deem it necessary to determine all the questions raised at the trial of this case, because it seems to us that there is one objection to the validity of the memorandum of the contract which is fatal to the plaintiffs' claim. It is conceded that the broker who made the contract had no express authority from the defendants to warrant the articles sold to be of merchantable quality. Never-

theless such a warranty was inserted in the memorandum or sale note delivered to the plaintiffs by the broker.

It was contended on the part of the plaintiffs that an authority to make such warranty is derived from the usage of trade; and evidence was offered from which, under instructions from the court, the jury have found that an authority was implied in case of a sale by a broker of the kind of merchandise described in the memorandum to insert a warranty of their quality which would be binding on the vendor. But notwithstanding this finding, we are clearly of opinion that the plaintiffs are not entitled to recover, because the alleged usage on which the jury have based their verdict is unauthorized by law, and cannot be regarded as valid. It contravenes the principle which has been sanctioned and adopted by this court upon full and deliberate consideration, that no usage will be held legal or binding on parties which not only relates to and regulates a particular course or mode of dealing, but which also ingrafts on a contract of sale a stipulation or obligation which is different from or inconsistent with the rule of the common law on the same subject: *Dickinson v. Gay*, 7 Allen, 34, 37 [83 Am. Dec. 656].

Such, as we understand it, was the effect of the usage proved at the trial. It consisted of two parts or branches, each of which was essential to the one integral usage on which the plaintiffs relied; and unless both can be maintained as legal and valid, the entire usage must fall to the ground. The first branch was, in substance, this: that, in a sale of the particular kind of goods which was the subject of controversy in this case, although nothing may have been said in making the bargain on the subject of warranty or as to the quality of the merchandise, and notwithstanding the buyer may have had opportunity to examine it, there was nevertheless a warranty tacitly implied that the article was merchantable. The second branch of the usage was a sequence of the first, and was this: that where the same kind of goods was sold through the agency of a broker he had by implication derived from usage authority to give an express warranty of the articles and to insert it in the memorandum, unless forbidden to do so by the vendor. The proof of usage, therefore, was confined in terms to cases where a warranty as between vendor and purchaser would be implied if the sale was made directly, without the intervention of a broker, and it was only as a part of or consequence of this usage that a broker was authorized to insert an express

warranty in the sale note when employed to sell the same kind of merchandise. It was not contended that any distinct and independent usage existed by which a broker had authority to give such warranty, but only that as by usage a warranty would be implied in a sale of such goods between vendor and purchaser, so an authority by the same usage was given to the broker to insert an express warranty in the memorandum.

Regarding, therefore, the usage as an integral one, the decisive objection to its recognition is, that it embraces an element directly contrary to the ancient and well-established rule of the common law that a vendor cannot be held responsible for the quality of goods sold if he make no warranty or representation concerning their nature, condition, or merchantable value. In other words, it abrogates, to a certain extent, the maxim *caveat emptor*, and puts on the vendor the burden of warranty, although he may be ignorant of the quality of the articles, or may have had no means of ascertaining their condition or value, and may have had no intention of selling the article with warranty. Such a usage is very like the one relied upon in the leading case of *Thompson v. Ashton*, 14 Johns. 316, which was held invalid and of no effect because it tended to introduce vagueness, confusion, and uncertainty into the rules regulating the rights and obligations of parties under contracts for the sale of merchandise.

But we do not think that it would avail the plaintiffs, or add anything to the validity of the usage which they set up in support of the contract of sale, if we could separate its two parts or branches, and consider the case as depending on that portion of the usage only by which an authority is implied in a broker to insert an express warranty of an article in a sale note when no such authority has been conferred by the vendor. The difficulty in the way of sanctioning and adopting in a court of law that part of the usage seems to us to be insuperable. It is liable to the grave objection that it is unreasonable, and so contrary to the ordinary rules by which the relation of principal and agent is regulated, that it cannot be presumed to have been in contemplation of a vendor in employing a broker to make a sale of merchandise. Even if the usage was known to the vendor, he would have a right to disregard it, and to disavow a contract made in conformity to it: *Seccomb v. Provincial Ins. Co.*, 10 Allen, 305, 314. We have very great doubt whether a usage can be regarded as reasonable which invests an agent with power to bind his principal by a contract

into which the latter had not, by any word or act, either express or implied, of his own, authorized the agent to enter. The effect of the usage in question is not merely to give authority to a person acting as broker for another to make a sale in the ordinary way with the usual stipulations and incidents of such a contract; but it extends the authority of the agent, and invests him with power to insert a special agreement, which fastens on the vendor a liability not usually included in a sale of chattels in the regular course of business.

But the objection does not stop here. By the terms of the usage, as proved at the trial, the authority of the broker to give a warranty is implied, wholly irrespective of the nature and condition of the particular property which may be the subject of the contract, without any regard to the facts and circumstances under which the sale is authorized to be made. If this usage is upheld, then a broker may give a warranty binding on his principal, although the latter may have authorized goods to be sold, not for a sound price, but at a rate far below the market value of a merchantable article; so he may be held liable on his broker's warranty, although at the time of the sale he may never have seen the goods, and knew nothing of their condition or value, or even when he knew that they were an inferior article, or had been greatly damaged; and this, too, where the vendee may have seen and examined the article, and had full opportunity to become acquainted with its quality and condition. The dangerous consequences which would follow if such usages were permitted to interfere with the operation of established legal principles and to control the rights and obligations of parties under contracts are too plain and palpable to allow us to hesitate in rejecting them as unreasonable and invalid.

We are inclined to think that the instructions were defective in not submitting to the jury in a clear and precise form the question of the authority of the broker to make three separate and distinct sales to different persons, instead of one sale of the whole lot of merchandise to one person. But it is unnecessary to dwell on this part of the case, as, in the event of another trial, the case may present itself in an aspect which will render this part of the controversy unimportant.

Exceptions sustained.

USAGE WILL NOT BE PERMITTED TO CONFLICT WITH SETTLED RULE OF LAW: See *Dickinson v. Gay*, 83 Am. Dec. 656, and see this case generally as to usages in regard to warranties in sales. To the point that usages which

contravene the settled rules of law cannot be shown, see the principal case cited in *Barnard v. Kellogg*, 10 Wall. 391; *Merchants' Bank v. State Bank*, 10 Id. 668; *Reed v. Richardson*, 98 Mass. 218; *Haskins v. Warren*, 115 Id. 536; *Remick v. Sandford*, 118 Id. 107. Thus a usage, that in sales of certain kinds of goods a warranty is implied, and that brokers are authorized to insert a stipulation for such a warranty, cannot be shown: *Boardman v. Spooner*, 13 Allen, 359, 360, 362.

EATON v. BOSTON AND LOWELL RAILROAD COMPANY.

[11 ALLEN, 500.]

THAT NEGLIGENCE OR TRESPASS OF THIRD PERSON CONTRIBUTED TO INJURY is no defense to an action by a passenger against a carrier to recover damages for an injury sustained through the carrier's negligence, although such third party acted entirely independently of the carrier.

WHETHER FAILURE OF SERVANTS OF RAILROAD COMPANY, IN CHARGE OF TRAIN which is stopped by an obstruction upon the track, to notify passengers to leave the cars, where a possible collision might be anticipated, is a neglect of duty, is a question for the jury upon all the evidence.

TORT for damages for personal injury sustained by plaintiff while a passenger in the car of the defendant company. The injury was received on a portion of the Essex railroad used in common by the defendants and the Eastern railroad, under the authority of statute (Massachusetts Statutes of 1851, chapter 128), the material portions of which are referred to in the opinion. The wheels of a wagon loaded with hay, which the driver was attempting to take from the highway along the railroad track to certain private premises, were caught between the rails and the planking, outside of the limits of the highway, and there held fast; and while in this position, the defendants' train, on which the plaintiff was a passenger, came from South Danvers towards Salem, around a curve, and was stopped just as it reached the load of hay. The train run by the Eastern Railroad Company from Lawrence to Salem was almost due. The defendants sent a flagman to stop that train, and were endeavoring to remove the load of hay, when that train came rapidly round the curve and ran into the defendants' train, thereby causing the injury to the plaintiff. Defendants contended, and introduced evidence to prove, that the collision and injury were the result of negligence of the Eastern Railroad Company in not running its train on time, and also of the negligence of the driver of the wagon. The third instruction asked by defendants was as follows: "The defendants were not bound to attempt to remove the passengers from their cars

under the circumstances of this case." The instruction was refused, but the court instead instructed the jury as follows: "In reference to the duty of the defendants, upon meeting an obstruction to the progress of their train, to give notice to their passengers of the expediency of their leaving the cars to avoid the impending danger from the approach of the Salem and Lawrence cars, the jury will judge; and if they find that no other effectual means could then be used to avoid the injury that would arise from their exposure to be run into by the Lawrence and Salem cars, and that this would have been effectual, and might have been done, giving the passengers sufficient time to leave the cars, it will be for the jury to say whether the omission so to do was a neglect of duty on the part of the defendants, for the consequences of which they are responsible,—the jury taking into consideration the actual state of the cars and the opportunities that existed for the removal of the passengers from them." The remaining facts appear in the opinion.

J. G. Abbott and B. Dean, for the defendants.

J. C. Perkins and W. C. Endicott, for the plaintiff.

By Court, COLT, J. At the time of the injury complained of, the relation of passenger and carrier existed by contract between the plaintiff and the defendants; they had received the plaintiff upon their cars, and were bound to the exercise of all that care and caution which the relation imposes. The degree of care required is measured by the extent of the peril to human life and limb which would be occasioned by neglect; and was therefore the highest which may reasonably be exercised in order to prevent those injuries which human foresight could avert. The plaintiff has the right to look to the defendants in the first instance for the discharge of this obligation assumed. And it is no answer to an action by a passenger against a carrier, that the negligence or trespass of a third party contributed to the injury. These propositions would be more manifest if this action had been brought in form upon the implied undertaking of the defendants; but the plaintiff may elect to sue in tort or contract, and the rule of duty is the same in either form of action: *Warren v. Fitchburg R. R.*, 8 Allen, 227 [85 Am. Dec. 701]; *Ingalls v. Bills*, 9 Met. 1 [43 Am. Dec. 346]; *McElroy v. Nashua and Lowell R. R.*, 4 Cush. 400 [50 Am. Dec. 794]; *Sullivan v. Philadelphia & R. R. R.*, 30 Pa. St. 234 [72 Am. Dec. 698].

Even if no privity of contract existed, and the injury was the result of the joint act of the defendants, the owner of the load of hay and the Eastern Railroad Company, it would furnish no defense to this action; for, in actions of this description, non-joinder of defendants cannot be availed of in bar. And this is true, although the party contributing by his negligence was acting without concert with and entirely independently of the defendants: *Midge v. Goodwin*, 5 Car. & P. 190. The cases cited by the defendants, in opposition to these propositions, against towns for injuries occasioned by defects in highways, are reconciled by the consideration that this liability of towns is wholly statutory; and by the construction given to the statute, no action can be maintained unless the injury arises wholly from the defect: *Rowell v. Lowell*, 7 Gray, 100 [66 Am. Dec. 464]; *Kidder v. Dunstable*, 7 Id. 104; *Richards v. Enfield*, 13 Id. 346; *Moore v. Abbot*, 32 Me. 46.

The first, second, and fourth prayers for instructions, exonerating the defendants if the negligence of other parties contributed to the injury, were therefore properly refused, unless the case is taken out of the scope of these principles by the provisions of the statute of 1851, chapter 128, upon which the defendants rely. By this statute, certain railroad corporations, including the defendants and the Eastern Railroad Company, were authorized to enter upon and use a portion of the Essex railroad in common. Numerous provisions are therein made regulating the manner of the use and the compensation to be paid. A superintendent is to be appointed by the companies, and the directors of all the corporations are to make such arrangements as are necessary for the joint management and repair of the road; and in case of disagreement, each of said companies is empowered to apply to the county commissioners, who shall act as arbitrators on all points of difference between them. By section 6 it is provided that "in case of any accident occurring upon that part of the Essex railroad, . . . that company shall be held liable for the same by whose act, neglect, or default it was occasioned; and if it shall occur in consequence of any defect in the road, the damage shall be borne by the three companies respectively, in the same proportion in which they are required to pay for repairs of the road."

It is contended that as these provisions establish a tribunal, consisting of the directors of all the roads, for the settlement of the arrangements for the joint management, the defendants

are not liable in any form for injuries to third persons from any want of safety in the management fixed upon. But the defendants cannot escape liability for injuries occasioned by arrangements with the other roads to which they assented by which the safety of passengers was endangered. It was not the purpose of the statute to establish a tribunal to settle these arrangements, whose adjudications should be conclusive upon all persons upon the question of their propriety. The instructions of the presiding judge upon this point were carefully given, and were in no respect erroneous. All the provisions of this statute, including section 6, were intended, we think, to regulate the use of the road and define the liability of these corporations among themselves for injuries happening on the road so used in common. As to strangers and other parties not in privity of contract, the liability of each stands upon common-law principles.

The third instruction asked for was fully covered by the instructions given. It was wholly for the jury under all the circumstances to say whether due care required the defendants' servants to remove the passengers from the car, and it was so left to them.

All the instructions not given were rightly refused, and those which were given were sufficiently favorable to the defendants.

Judgment on the verdict.

IN ACTION BY PASSENGER AGAINST CARRIER FOR DAMAGES for an injury sustained through negligence, the rule of duty is the same whether the form of action be contract or tort: *Warren v. Fitchburg R. R. Co.*, 85 Am. Dec. 701, and note; and see the principal case cited to the same effect in *Hibbard v. Thompson*, 109 Mass. 288.

CONTRIBUTORY NEGLIGENCE OF THIRD PERSONS IS NO DEFENSE in an action by a passenger against a carrier for injuries resulting from the carrier's negligence: See the principal case cited to this effect in *McDonald v. Snelling*, 14 Allen, 292; *Simmons v. New Bedford etc. Co.*, 97 Mass. 368; *Transfer Co. v. Kelly*, 36 Ohio St. 92; *Mann v. Weiland*, 81½ Pa. St. 256.

McAVOY v. MEDINA.

[11 ALLEN, 548.]

PROPRIETOR OF SHOP IS ENTITLED TO POSSESSION OF POCKET-BOOK which has been accidentally left by another upon a table there, and has remained uncalled for, as against a stranger who first sees it there. Property so left is not to be treated as other lost property, so as to entitle the finder to take and hold possession.

DEFENDANT was a barber, and the plaintiff, being a customer in the defendant's shop, saw and took up a pocket-book which was lying upon a table there, and said: "See what I have found." The defendant asked where he found it. The plaintiff laid it back in the same place and said, "I found it right there." The defendant then took it and counted the money, and the plaintiff told him to keep it, and if the owner should come to give it to him, and otherwise to advertise it; which the defendant promised to do. Subsequently the plaintiff made three demands for the money, but the defendant never claimed to hold the same until the last demand. It was agreed that the pocket-book was placed upon the table by a transient customer of the defendant, and accidentally left there, and was first seen and taken up by the plaintiff, and that the owner had not been found. Judgment for defendant. Plaintiff alleged exceptions.

E. J. Sherman and J. C. Sanborn, for the plaintiff.

D. Saunders, Jr., for the defendant.

By Court, DEWEY, J. It seems to be the settled law that the finder of lost property has a valid claim to the same against all the world except the true owner, and generally that the place in which it is found creates no exception to this rule: 2 Parsons on Contracts, 97; *Bridges v. Hawkesworth*, 7 Eng. L. & Eq. 424.

But this property is not, under the circumstances, to be treated as lost property in that sense in which a finder has a valid claim to hold the same until called for by the true owner. This property was voluntarily placed upon a table in the defendant's shop by a customer of his, who accidentally left the same there and has never called for it. The plaintiff also came there as a customer, and first saw the same and took it up from the table. The plaintiff did not by this acquire the right to take the property from the shop, but it was rather the duty of the defendant, when the fact became thus known to him, to use reasonable care for the safe-keeping of the same until the owner should call for it. In the case of *Bridges v. Hawkesworth*, *supra*, the property, although found in a shop, was found on the floor of the same, and had not been placed there voluntarily by the owner, and the court held that the finder was entitled to the possession of the same, except as to the owner. But the present case more resembles that of *Lawrence v. State*, 1 Humph. 228 [34 Am. Dec. 644], and is.

indeed, very similar in its facts. The court there take a distinction between the case of property thus placed by the owner and neglected to be removed, and property lost. It was there held that "to place a pocket-book upon a table and to forget to take it away is not to lose it, in the sense in which the authorities referred to speak of lost property."

We accept this as the better rule, and especially as one better adapted to secure the rights of the true owner.

In view of the facts of this case, the plaintiff acquired no original right to the property, and the defendant's subsequent acts in receiving and holding the property in the manner he did does not create any.

Exceptions overruled.

RIGHT TO POSSESSION OF PROPERTY ACCIDENTALLY LAID DOWN at store or house, and which remains uncalled for: See *Lawrence v. State*, 34 Am. Dec. 644. See the principle laid down in the principal case, that one discovering property which has been left on the counter or desk in a business place is not a finder of lost property, reiterated in *Kincaid v. Eaton*, 98 Mass. 141. In *Bowen v. Sullivan*, 62 Ind. 287, an employer, in sorting bales of waste paper (part of his business), came upon genuine bank bills. It was held that the rule of the principal case did not apply, and that the defendant was a finder of lost property.

CASES
IN THE
SUPREME COURT
OF
MICHIGAN.

BOARDMAN v. AGER.

[18 MICHIGAN, 77.]

TAKING OUT EXECUTION ON ONE OF SEVERAL SEPARATE JUDGMENTS recovered against several joint trespassers is an election by the plaintiff to enforce that judgment, and though he fails to obtain satisfaction he cannot sustain an action upon any of the other judgments.

DEBT upon a judgment rendered in the state of New York. The defendant offered to show, under a special notice attached to his plea, that the trespass for which the judgment was rendered was committed by him jointly with two other persons, and that the plaintiff obtained a judgment in New York against the latter in a separate action against them for the trespass; and upon this judgment two executions had been sued out; one before and one since the rendition of the judgment sued on, and placed in the hands of the sheriff for collection. An objection to the admission of this testimony was interposed and sustained by the court, and the defendant excepted; and judgment being for the plaintiff, the defendant assigned error.

Walker and Kent, for the plaintiff in error.

E. Smith, Jr., and D. C. Holbrook, for the defendant in error.

By Court, CHRISTIANCY, J. Can a plaintiff, who has sued several joint trespassers in separate actions, recovered separate judgments, and taken out execution upon one of them, but failed to obtain satisfaction, sustain an action upon any of the other judgments?

This is the only question in the case. There is some conflict in the cases upon this point; but after a careful examination of the authorities, we are satisfied that the great preponderance of authority is against the right to maintain the action in such a case. When separate actions are brought against several joint trespassers there is nothing which requires the damages recovered in one of the actions to be measured or limited by those in the others. The amounts recovered will therefore almost of necessity be different, and generally are so. Aside from a few cases, which hold the mere recovery of a judgment against one joint trespasser to be a bar to any action against another (which we do not think can be supported upon principle or authority), almost all the cases seem to agree that the plaintiff may sustain separate actions against the several joint trespassers, though he can have but one satisfaction; but he may elect *de melioribus damnis*, and must elect which judgment he will enforce; and having made his election of one, he cannot resort to the others.

On a first view it would seem plausible that the plaintiff should be allowed, as in cases of separate judgments against different parties for the same debt (as, for example, makers and indorsers), to proceed with the enforcement of his executions upon all his judgments until one satisfaction is obtained. But in the latter class of cases, the judgments being for the same amounts, the plaintiff is not put to his election. In the case of several judgments against joint trespassers, the suing out of an execution is held, and we think properly held, to constitute an election in favor of the judgment upon which it is issued. It would lead to much confusion and great practical difficulties to attempt to carry out and enforce this election if it were made to depend upon any fact occurring after that time. If several executions were issued upon all the judgments at the same time or successively, would the plaintiff be held to have elected in favor of that upon which property should be first seized? This might not be his act, but rather that of the sheriff. If part of the money be made upon the smaller execution, could the sheriff proceed to collect the whole of the larger, or only enough to pay the balance upon the smaller? If part be first made upon the larger, could the sheriff proceed to collect on the smaller enough to make the balance, provided such balance did not exceed the smaller? It is easy to see that such a course of proceeding would be difficult to be sustained upon any idea of election between the

judgments, and that it would lead to many embarrassing questions, especially as the executions might be in the hands of different officers, and even in different states.

We think, therefore, the evidence offered by the defendant below, in pursuance of his notice, was improperly excluded. The judgment must therefore be reversed, with costs, and a new trial granted.

The other justices concurred.

WHEN PLAINTIFF RECOVERS SEPARATE JUDGMENTS AGAINST SEVERAL CO-TRESPASSERS, he must elect *de melioribus damnis*, and by the satisfaction of one judgment the other co-trespassers are released from all liability except payment of costs: See note to *Kirkwood v. Miller*, 73 Am. Dec. 145-147, where the liability of co-trespassers is thoroughly treated; see also *Stone v. Dickinson*, 81 Id. 727; *Ayer v. Ashmead*, 83 Id. 154. The principal case is cited to the point that a recovery of judgment and levy of execution against one of several who were jointly guilty of conversion precludes recourse against the others, the principle as to joint trespassers being applicable: *Kenyon v. Woodruff*, 33 Mich. 315.

LAING v. McKEE.

[13 MICHIGAN, 124.]

PURCHASER AT TAX-SALE TO WHOM OWNER TENDERS AMOUNT OF HIS BID, with twenty-five per cent interest, for an assignment of the certificate of sale, and who orally agrees to make such assignment to the owner within a few days and receive the money, but in fact obtains a deed from the auditor-general after the owner, relying upon this promise, has allowed the time for redemption to expire, and refuses, upon tender of the amount of his bid, with interest and charges, to convey to the owner, is guilty of a fraud upon the owner, cannot avail himself of the statute of frauds as a defense, and will be compelled by equity to convey to the owner.

BILL in equity. The opinion states the case.

S. L. Kilbourne, for the complainant.

J. H. McKee and Hanchett and Lyon, for the defendant.

By Court, COOLEY, J. The bill of complaint in this case sets forth that complainant is the owner of a forty-acre lot in Clinton county, which, at the annual tax sales, made in October, 1858, was sold to defendant for taxes delinquent for the year 1857, amounting to \$1.41; that complainant, having a right to redeem from this sale, sent the money for that purpose by one Treat to the office of the auditor-general, but that Treat, ascertaining that the sale was made to defendant, who

was a neighbor of complainant, returned the money without redeeming, saying that he thought complainant could procure an assignment of the certificate of sale from defendant; that complainant called upon defendant for that purpose, who told him the certificate was then at Lansing, but he might send for and obtain it, and defendant would then assign it; that complainant sent and obtained it accordingly, and gave it to one Alvah C. Laing, with a sum of money sufficient to pay defendant the amount of his bid, together with twenty-five per cent interest thereon, and that said Alvah, in the latter part of September, 1859, took the same to defendant with a request that he should assign the certificate; that defendant said he would do so, but could not do it then, owing to the absence of an officer to take the acknowledgment, but he would make and acknowledge the assignment, and in two or three days take it to complainant, and would then receive the money for the same, together with the expenses of the acknowledgment.

The bill further states that complainant believed and relied upon this assurance, and consequently allowed the time for redemption to expire without redeeming; but defendant, after the time to redeem had expired, surrendered his certificate, and obtained from the auditor-general a deed, and that he now refuses on demand to receive the amount of the bid, with twenty-five per cent interest and his costs and expenses in the premises, and convey to complainant. And the bill prays that he may be compelled to convey accordingly.

The case was heard on pleadings and proofs, and we think the evidence taken fully substantiates the material charges made by the complainant's bill. He is therefore entitled to the relief prayed unless the bill itself fails to make a sufficient case.

It is objected on the part of defendant that the agreement on his part was a parol contract in relation to lands, and therefore void under the statute of frauds, and that there has been no such part performance of it as will entitle complainant to have it specifically performed.

We do not think this case is to be put on the ground of specific performance solely. The facts charged and established show that complainant, relying upon the promise of defendant to assign, neglected to exercise his legal right to redeem, and defendant was thereby enabled to obtain a deed of the lands. It sufficiently appears that complainant would have made the redemption but for the assurances thus made to him, and a

fraud has thus been perpetrated upon him, against which he is entitled to relief. It is a matter of no moment whether the fraud was perpetrated by means of a promise upon which he relied, and which the defendant did not intend to keep, or by untrue statements as to existing facts. And it is not necessary for us to decide, in this view of the case, whether the agreement to assign the certificate was or was not void under the statute of frauds.

It is also objected that the terms of the understanding between the parties were indefinite, inasmuch as the rate of interest to be paid by complainant was not fixed. We think the evidence establishes the fact that Alvah C. Laing handed to defendant the amount of the bid, with twenty-five per cent interest thereon, and that defendant returned the same with the excuse before mentioned, at the same time promising to bring up an assignment and take the money, together with the expense of acknowledgment, in three or four days. Without going back of this interview, there is sufficient to establish with precision the terms upon which the transfer was to be made, and we shall not, therefore, consider what might have been the effect upon this case of any ambiguity in these terms.

The decree of the court below must be reversed, and a decree entered in this court granting to complainant the relief prayed, with costs of both courts.

CAMPBELL and CHRISTIANCY, JJ., concurred.

MARTIN, C. J. (dissenting). I cannot concur in this opinion, as I can find from the testimony no evidence of a contract which the law should or will enforce, and of course no breach of performance. Neither do I discover any fraud in the conduct of McKee respecting the subject of controversy.

RELIEF IS GRANTED IN EQUITY IN CASE OF BREACH OF AGREEMENT to permit redemption, and the statute of frauds is no defense: See *Adams v. Kable*, 44 Am. Dec. 772, and note 776; *Griffin v. Coffey*, 51 Id. 519; *Vannoy v. Martin*, 51 Id. 418. One who, while holding out inducements to another, whose estate is largely encumbered, that he will furnish means for him to redeem, and thereby prevents him from looking elsewhere, and in the mean time purchases such encumbrances himself and cuts off the redemption, is guilty of fraud, and will not be allowed to enforce his advantage: *Wilson v. Eggleston*, 27 Mich. 260, following and approving the principal case.

FRASER v. LITTLE.

[13 MICHIGAN, 196.]

JUDGMENT IN ACTION AGAINST SURETIES ON REPLEVIN BOND cannot be given for more than the penalty and costs. Interest is not recoverable.

INTEREST IS RECOVERABLE IN ACTION ON BOND given in the amount actually due, and not in a penalty.

INTEREST IS NOT RECOVERABLE IN ACTION ON BOND GIVEN IN PENALTY.

DEBT on a replevin bond. The opinion states the case.

Backus and Harbaugh, for the plaintiffs in error.

William L. Webber, for the defendants in error.

By Court, MARTIN, C. J. This action is for the recovery of the penalty of a bond executed by Fraser and Raymond, in the penalty of \$800, conditioned that one Robertson should prosecute to effect an action of replevin then commenced by him against the defendants in error, Little, Hess, and Boutell. It appears that Robertson was defeated in his action, and judgment rendered against him for the value of the property replevied by him, viz., for \$1,753.73. I do not learn from the bill of exceptions that any execution was issued upon such judgment, and returned as unsatisfied wholly or in part, nor that any effort was made to collect from Robertson the amount of such verdict. In this action, the court rendered judgment against Fraser and Raymond for the penal sum of the bond, with interest (called damages for the detention of the sum of \$800), from the rendition of the judgment in the action of replevin, amounting in all to the sum of \$1,010.31. The error assigned is, that the court rendered judgment for an amount exceeding the penal sum mentioned in the bond. I think this error is well assigned. The obligation of the plaintiffs in error arose upon no consideration received by them, or benefit which could accrue to them. It was purely voluntary, to satisfy the statute, and enable Robertson to prosecute his action of replevin. The statute requires such bond to be in a sum at least double the appraised value of the property replevied. This statute, I think, fixes the limit of the sureties' liability, so that, in executing a bond as surety, we must understand that he intends and only undertakes to become liable to the extent of the penal sum mentioned, and no further, and that the statute requires nothing more from him. Although there are conflicting authorities upon this question, yet it seems to me that upon no principle of equity or justice

can a surety upon such a bond, given under such circumstances and statutory requirements as the bond in this case was executed, and without any consideration received for it, or resulting benefit to spring from it, be held beyond the sum "nominated," and cast in damages, for no default of his own. The remedy of Little and others for any excess of damages over the eight hundred dollars is exclusively against the plaintiff in the action against them. Fraser and Raymond risked eight hundred dollars, and no more, and there could be no default upon their part by reason of the failure of the plaintiff in the replevin suit, or otherwise, which could increase the penal sum of the bond, or impose upon them a greater liability than the one assumed. The statute, as above remarked, having required the bond to be at least in double the appraised value of the property replevied, they had a right to suppose, and it would be a reasonable and natural presumption, that the penal sum fixed in the bond would and should cover all exigencies so far as affected their liability.

I think the judgment should have been for the sum of eight hundred dollars only, and that the judgment of the circuit court should be reversed, and a new trial ordered.

CAMPBELL, J. The only question in this case is, whether judgment can be given on a replevin bond for more than the penalty and costs. The action was an action of debt on a bond in the penalty of \$800, and judgment was rendered for an additional sum of \$210.81, by way of damages for its detention, in addition to costs of suit.

I think there is no foundation for any such judgment. Where a bond or specialty is given in the amount actually due, and not in a penalty, there is no reason and no rule which will prevent a recovery of interest on the actual debt, for which the bond is only an evidence under seal. But where an undertaking or condition is secured by a penal bond, which is not supposed to represent the actual debt by its penalty, such penalty never became the actual debt, except by way of forfeiture, and upon such a forfeiture interest was never allowed to run by the common law or by statute. And the cases cited on the argument, from Massachusetts and Kentucky, which assume that interest runs merely from the fact that the penalty became the debt upon forfeiture, are entirely unsupported, and would probably never have been made had not the actual debt in these cases equaled or exceeded the penal sum. As authori-

ties, they are based upon a false assumption, and cannot be maintained on any such principle. In England, the rule of liability upon bonds in a penalty has been almost entirely uniform, and the only cases extending it beyond the penalty and costs have been overruled and disregarded. The cases are collected in *Hurlestone on Bonds*, 107, 108, and the rule is there laid down in conformity with the prevailing authorities. The decisions supposed to favor another doctrine, as applicable to suits brought directly upon bonds, are *Francis v. Wilson*, Ryan & M. 105, and *Lonsdale v. Church*, 2 Term Rep. 388. In the former case, the bond was not, in any proper sense, a penal bond, as the penalty was in the exact amount of the debt mentioned in the condition, which was made expressly to carry interest. It was apparent that the sum mentioned could not be legally treated as a penalty, and the court properly enforced it as a simple money bond or specialty. *Lonsdale v. Church*, *supra*, is more directly in point, as the court refused to allow a defendant, on paying into court the penalty and costs, to obtain a discharge, and Buller, J., denied that the penalty of a bond limited the recovery. But this judge seems to stand alone in maintaining the doctrine. Very shortly before, in *White v. Sealy*, 1 Doug. 49, he had, on the hearing of a similar application, expressed a similar opinion, but he finally concurred with his brethren in holding that he had been mistaken. In *Knight v. McLean*, 3 Brown Ch. 496, sitting in an equity cause, he allowed interest beyond the penalty of a bond, but was overruled by Lord Thurlow, who held that there could be no such allowance, and that the rule was the same in equity as at law. In *Wilde v. Clarkson*, 6 Term Rep. 303, the doctrine of *Lonsdale v. Church*, *supra*, was expressly repudiated and overruled. In *Hefford v. Alger*, 1 Taunt. 218, the former cases were referred to, and Lord Thurlow's opinion approved; and in *Branscombe v. Scarbrough*, 6 Q. B. 13, where an action was brought on a replevin bond which was very much too small to secure the judgment, the court said that granting a rule to show cause why an allowance should not be made beyond the penalty and costs would be creating a doubt where no doubt existed. It cannot be said that under the English common-law decisions there is any room for controversy on the subject. It is only where a suit is brought on some judgment already rendered on a bond, as in *Blackmore v. Flemmyng*, 7 Term Rep. 446, and *McClure v. Dunkin*, 1 East, 436, or where an action is brought upon some

distinct covenant in a bond or other obligation, that the penalty becomes unimportant; but even in such cases, the penalty is not made the debt on which interest runs. The right to a decree in equity beyond the penalty of a bond is denied as clearly and consistently as at law. Where a debt is secured as such by other securities besides a bond, the fact that a bond has been taken will not usually affect the remedy on the other obligations. But there is no authority for allowing any recovery or account beyond the penalty when the bond becomes material. The only cases where a different result has been reached are where the bond debtor has resorted to equity to obtain relief from legal proceedings; and then it has been held that, as he who seeks equity must do equity, he might be compelled, after submitting his case to the jurisdiction of equity, to do what was just under the circumstances, and not to reap advantage from a delay which he has compelled his adversary to undergo. These rules and this class of exceptions will be found well settled by the decisions: *Mackworth v. Thomas*, 5 Ves. 329; *Tew v. Winterton*, 3 Brown Ch. 489; *Knight v. McLean*, 3 Id. 496; *Hughes v. Wynne*, Mylne & K. 20; *Clarks v. Seton*, 6 Ves. 411; *Clarke v. Lord Abingdon*, 17 Id. 106; *Pulteney v. Warren*, 6 Id. 92; *Grant v. Grant*, 3 Russ. 598; S. C., 3 Sim. 341; *Jeudwine v. Agate*, 3 Id. 129; *Walters v. Meredith*, 3 Younge & C. 264. See also Cooper's Cases in Chancery (Practice), pp. 200 et seq.

In *Mower v. Kip*, 6 Paige, 91 [29 Am. Dec. 754], the case was the same as in *Clarke v. Lord Abingdon*, 17 Ves. 106, and the decree was manifestly correct, because the mortgage was conditioned to secure the debt, and not the penalty. If designed to go further, the case is not sustained by the authorities. But it should be understood with reference to the facts presented. In *Farrar v. United States*, 5 Pet. 372, which was an action on a revenue bond, it was held that no judgment could be given beyond the penalty, and judgment below was reversed on that ground. In *United States v. Arnold*, 1 Gall. 348, although interest was awarded on a penalty, yet the question of such allowance was not discussed, and is not mentioned on the appeal, which was upon an entirely different question: *Arnold v. United States*, 9 Cranch, 104.

In New York, in *Clark v. Bush*, 3 Cow. 151, and *Fairlie v. Lawson*, 5 Id. 424, it was held, after an elaborate comparison of the cases that a surety on a bond could not be held beyond the penalty, whether the principal could be or not. Where

the bond is joint, no distinction could be taken between principal and surety, and the cases generally make no discrimination between them where they are sued in debt on bond, although some cases denying the universal effect of the penalty admit it as to sureties. In *Brainard v. Jones*, 18 N. Y. 35, it was held that, in a case like the present, interest might be recovered on the penalty. The reasons for the decision are not new, nor such as any mind of ordinary capacity could overlook. It is in direct conflict with the mass of decisions, and in conflict with the principle which underlies them all, that a penalty is not to be enlarged under any circumstances, and will not be enforced beyond its letter. With great respect for the author of the decision, I prefer to rest upon the known and settled rules of the law, which, in all such cases as the present, must be more in accordance with the understanding of the parties than any other. When the statute requires a bond in double the value of property, as fixed by sworn and disinterested appraisers, it must be presumed that neither the law nor the sureties could anticipate the necessity of any larger margin, to meet the possible views of another body of appraisers in the jury-box. I think the settled rule is the just one and should be adhered to.

I therefore concur in the views of the chief justice.

CHRISTIANCY, J., dissented.

WHETHER INTEREST CAN BE RECOVERED ON PENAL BOND BEYOND PENALTY. — The general subject of whether the recovery can exceed the penalty of a bond is treated in the note to *Graham v. Bickham*, 1 Am. Dec. 338-340. And upon the question of interest beyond the penalty, see also the note to *Mower v. Kip*, 29 Id. 754.

INTEREST BEYOND PENALTY NOT ALLOWED IN ENGLAND. — Though where a penal bound was given as security for the performance of covenants, the obligee had his election, at common law, to sue either upon the bond or upon the covenant, and in the latter case, might recover his actual damages though they exceeded the amount of the penalty; even this exception to the stringent rule obtaining in England was removed by statute 8 & 9 Wm. c. 11, sec. 8, which restricted the recovery for breach of covenants to the amount of the penalty: *Wilde v. Clarkson*, 6 Term Rep. 304; note to *Graham v. Bickham*, 1 Am. Dec. 338, 339. And the rule now is, that the penalty with costs of suit is the limit of recovery upon all penal bonds, whether given as security for the performance of covenants or for the payment of money, and whether the action is against principal or sureties, or against both: *Branscombe v. Scarbrough*, 6 Ad. & E., N. S., 13 (replevin); *Branguin v. Perrot*, 2 W. Black. 1190 (bastardy); *Shutt v. Proctor*, 2 Marsh. 226 (bastardy); *Wilde v. Clarkson*, 6 Term Rep. 304 (bastardy). Such, also, is in general the rule of American law, and here, as in England, though the recovery upon a penal bond may be

much less than the penalty, the damages for the breach of the condition of the bond cannot exceed the penalty; but in this country, the amount of recovery in an action upon the bond may exceed the penalty, because here damages for the detention of the penal sum are allowed in the form of interest thereon, whereas in England this is denied. In England, the stringent limitation of the recovery upon a penal bond to the penalty thereof is maintained, and interest is not allowed to be computed upon or beyond the penalty, even though the bond be conditioned for the payment of money and interest, and though it be a single bill: *Tew v. Winterton*, 3 Brown Ch. 499; *Knight v. Maclean*, 3 Id. 496; *Hughes v. Wynne*, 1 Mylne & K. 20; *Clarke v. Seton*, 6 Ves. 411; *Walters v. Meredith*, 3 Younge & C. 264; *Hefford v. Alger*, 1 Taunt. 218; *Johnes v. Johnes*, 5 Id. 650; *Jewon v. Bush*, 1 Vern. 342. So in a money bond, when the principal and interest equal the amount of the penalty, the interest must thenceforth cease: *Hefford v. Alger*, *supra*; *Jewon v. Bush*, 1 Vern. 342; *Steward v. Rumball*, 2 Id. 509; *Hellers v. Ardley*, 3 Car. & P. 12. Therefore, in the language of Chief Justice Mansfield, "in a court of equity, a note of hand is a better security": *Hefford v. Alger*, *supra*. And as an example of the extent to which this rule is maintained, even where a person conveyed estates to trustees upon trust, to sell and apply the proceeds to discharge all his bond debts, together with the interest then due and to grow due to the day of payment, it was held that a bond creditor was not entitled to principal and interest beyond the penalty of the bond: *Hughes v. Wynne*, 1 Mylne & K. 20. But if the trustees omit to pay within a reasonable time, it has been held that they must pay interest after such neglect: *Anonymous*, 1 Salk. 154.

But even in England there are some authorities which have permitted the recovery of interest upon a money bond beyond the penalty: *Lonedale v. Church*, 2 Term Rep. 388; Bull. N. P. 178; *Holdipp v. Otway*, 2 Saund. 106; *Elliott v. Davis*, Bund, 23; *Duwall v. Terrey*, Show. Parl. C. 15; *Francis v. Wilson*, Ryan & M. 105, in which last case the penalty and the debt were the same amount, and the bond stipulated for the payment of interest, and the court very properly allowed it. But *Lonedale v. Church*, *supra*, is regarded by the later English cases cited above as overruled by *Wilde v. Clarkson*, 6 Term Rep. 304, and the rule is settled in England as before stated.

Exceptions to this rule are made by courts of equity, however, which, appreciating and following the dictates of real justice, compel the obligor, when he appears in the attitude of a plaintiff suing for relief, to pay interest beyond the penalty "nominated in the bond," upon the maxim that he who seeks equity must do equity: *Clarke v. Seton*, 6 Ves. 411; *Anonymous*, 1 Salk. 154; note to *Clarke v. Lord Abington*, 17 Ves. 109; *Hugh Audely's Case*, Hardr. 136; S. C., 1 Eq. Cas. Abr. 91, 92. So where a creditor has been kept out of his money by injunction or other proceeding by which he has been prevented from prosecuting his remedy at law, equity will allow him all the interest accumulated by the delays so occasioned: *Hale v. Thomas*, 1 Vern. 349; *Duwall v. Terrey*, Show. Parl. C. 15; *Pulteney v. Warren*, 6 Ves. 73, 92; *Grant v. Grant*, 3 Russ. 598; S. C., 3 Sim. 341.

AMERICAN RULE, INTEREST RECOVERABLE. — *Money Bonds*. — Though a few early cases in America, induced by English precedents, have held that interest cannot be recovered beyond the penalty, even upon a single bond for the payment of money, — *Warden v. Nielson*, 1 Murph. 275; S. C., 3 Am. Dec. 691; *Cherry v. Mann*, Cooke, 268; S. C., 5 Am. Dec. 696; but see *State v. Blakemore*, 7 Heisk. 638, 657; *Bonsall v. Taylor*, 1 McCord, 503, 511; *Smith v. Vanderhoof*, 1 Id. 328; S. C., 10 Am. Dec. 674; *Payne v. Ellzey*, 2 Wash. (Va.)

143, — yet the authorities in this country are practically unanimous in holding that as against the obligor on a single bond for the payment of money, the principal and all the interest may be recovered though it exceeds the penalty: *Harris v. Clap*, 1 Mass. 308; S. C., 2 Am. Dec. 27; *Long v. Long*, 16 N. J. Eq. 59; *Smedes v. Hooghtaling*, 3 Caines, 48; S. C., 2 Am. Dec. 250; *Lyon v. Clark*, 8 N. Y. 148; *Fairlie v. Lawson*, 5 Cow. 424; *Moss v. Wood*, R. M. Charl. 42; *Commonwealth v. Lynd*, 14 Phila. 144; *Boyd v. Boyd*, 1 Watts, 365; *Ritchie v. Shannon*, 2 Rawle, 196; *Norris v. Pilmore*, 1 Yeates, 408; *Hughes v. Hughes*, 54 Pa. St. 240; *Roulain v. McDowall*, 1 Bay, 490; *Goldhawk v. Duane*, 2 Wash. C. C. 323; *Bank of United States v. Magill*, 1 Paine, 661; *Ives v. Merchants' Bank*, 12 How. 159, 164.

This is allowed in equity upon the ground that the penal part of a bond for the payment of money has, through the interference of equity and the enactment of statutory law, lost its original function and become an unmeaning form: *Tazewell v. Saunders*, 13 Gratt. 368. Originally, the obligee might recover the full penalty of the bond though the real debt and interest were much less in amount. Here equity interposed and relieved the debtor from his penal obligation upon payment of the principal, interest, and costs, and this afterwards became the rule at law by statute 4 Anne, c. 16, secs. 12, 13; *Note to Graham v. Bickham*, 1 Am. Dec. 338, 339. The English courts thereupon illogically permitted the penalty to remain the limit of the debtor's responsibility, which certainly gives him an undue advantage under the contract, since, if the principal and interest amount to less than the penalty, he may discharge his obligation by paying less than the penalty, — that is, the real debt, with interest; on the other hand, if the principal and interest exceed the penalty, he may relieve himself of liability by paying less than his real debt, namely, the penalty of his bond; and in one case the creditor gets his exact due, which is just, and in the second case he may get much less than his due, which is unjust. Furthermore, it is illogical, inasmuch as to reach this result the penalty is at one time eliminated from consideration, and at another is given full force and effect, which is inconsistent, for the contract is either to be construed according to its terms on all occasions, or at variance with its terms and according to the "real intention of the parties"; and to construe it in one way under one set of circumstances, and in another way under another set of circumstances, is clearly illogical, inconsistent, and not in the line of proper legal reasoning, as well as productive of injustice. So in *Long v. Long*, 16 N. J. Eq. 59, it is forcibly said: "For more than two hundred years the principal specified in the condition of the bond, with interest, has been regarded as the real debt, and the penalty the mere form by which the debt is secured. Why should it be regarded otherwise for the sole purpose of defeating the obligee of his just claim?"

When the action is at law, however, the interest beyond the penalty of the bond must be awarded in the form and under the name of damages for the detention of the penalty; that is, as interest upon the penalty, and not upon the debt: *Lyon v. Clark*, 8 N. Y. 155; *Cook v. Tousey*, 3 Wend. 444; *Mover v. Kip*, 6 Paige, 88; S. C., 29 Am. Dec. 748, 751; *Boyd v. Boyd*, 1 Watts, 365; *Ritchie v. Shannon*, 2 Rawle, 196; *Norris v. Pilmore*, 1 Yeates, 408; *Roulain v. McDowall*, 1 Bay, 490; *Williams v. Willson*, 1 Vt. 266; *Abbott v. Wilmott*, 22 Id. 437; *Baker v. Morris*, 10 Leigh, 284; *Tennant v. Gray*, 5 Munf. 494; *Tazewell v. Saunders*, 13 Gratt. 354, 368. The damages should be found by the jury distinct from the penalty: *Roulain v. McDowall*, 1 Bay, 490. And the whole amount of recovery, that is, the penalty and damages for its detention, must not exceed the real debt and interest thereon; and on

the other hand, it cannot exceed the amount of the penal sum and interest: *Lyon v. Clark*, 8 N. Y. 148; *Taxewell v. Saunders*, 13 Gratt. 354, 368; *Baker v. Morris*, 10 Leigh, 284; *Tennant v. Gray*, 5 Munf. 494.

But in equity the proper view is taken of the matter; the penalty is regarded as a mere matter of form, and decree is rendered for the principal and full interest which the bond is given to secure, notwithstanding this amount exceeds the penalty of the bond: *Taxewell v. Saunders*, 13 Gratt. 354, 368; *Baker v. Morris*, 10 Leigh, 284; *Long v. Long*, 16 N. J. Eq. 59.

If nominal damages only are assessed by a jury, the excess cannot subsequently be taxed by the taxing officer, and included in the costs, as is the practice where the judgment goes by default or confession: *Cook v. Tousey*, 3 Wend. 444.

In South Carolina it is held that judgment may be given for the penalty of a bond when the principal sum due, with accrued interest, exceeds that amount, although the penalty is more than double the amount intended to be secured thereby: *Daniels v. Moses*, 12 S. C. 130.

DISTINCTION TAKEN BETWEEN BONDS FOR PAYMENT OF MONEY AND BONDS FOR PERFORMANCE OF COVENANTS OR WITH OTHER COLLATERAL CONDITIONS. — We have now arrived at the point where the authorities materially diverge. As against the principal obligor upon a money bond, they unanimously concur that interest may be recovered beyond the penalty of the bond. But at this point a distinction is taken by some authorities, and among them the principal case, which maintain that though this rule prevails in the case of money bonds, it does not obtain when bonds with other conditions are in question, such as bonds given as security for the performance of covenants, as for the conveyance of land, or bonds given upon the taking of appeals, bonds given by employees or public officers for the faithful discharge of their duties, bonds of executors, administrators, and guardians, indemnity bonds, replevin and injunction bonds. Upon these bonds, this class of authorities maintain, the penalty is the absolute limit of recovery against principal or surety, and interest beyond the penalty cannot be recovered: *Long v. Long*, 16 N. J. Eq. 59; *Farrar v. Christy*, 24 Mo. 74; *State v. Sandusky*, 46 Id. 377; *Fairlie v. Lawson*, 5 Cow. 424; *Lyon v. Clark*, 8 N. Y. 148 (but see *Braimard v. Jones*, 18 Id. 35); *Bank of United States v. Magill*, 1 Paine, 661; *Ives v. Merchants' Bank*, 12 How. 159, 164. In many of these cases this distinction is merely *dictum*, the bond involved being one for the payment of money only, and is expressed in an attempt to reconcile the English authorities. The English authorities are not, however, reconcilable, and this may as well be admitted at once. For even upon money bonds interest cannot there be recovered beyond the penalty. The real cause of the conflict is overlooked in the above cases. It is a fundamental difference of legal principle, such as is sometimes, though rarely, met between American and English common law. It is, in brief, that in England when there is no definite time stipulated for the payment of money, and no contract, express or implied, that interest shall be paid, interest cannot be recovered; and interest is usually allowed by implication only upon mercantile securities, or where it is allowable by custom, and is seldom, if ever, allowed upon contracts or obligations other than for the payment of money: *Higgins v. Sargent*, 2 Barn. & C. 348; 2 Sedgwick on Damages, 7th ed., 159. But the courts of this country are much more liberal in permitting the recovery of interest, and it may be recovered here whenever a debtor is in default for not paying money as damages for the detention thereof. In England, it may be said generally the tribunals restrict themselves usually to those cases where an agreement to pay interest can be

proved or inferred, while the courts of the United States "have shown themselves more liberally disposed, making the allowance of interest more nearly to depend on the equity of the case, and not requiring either an express or implied promise to sustain the claim. The leading difference seems to grow out of a different consideration of the nature of money. The American cases look upon the interest as the necessary incident, the natural growth of the money, and therefore incline to give it with the principal, while the English treat it as something distinct and independent, and only to be had by virtue of some positive agreement": 2 Sedgwick on Damages, 7th ed., 174. English authorities seldom allow interest as damages for the detention of money, while this is regarded as eminently just and proper in America; and it is for this reason that the courts of this country allow the recovery to exceed the penalty of a money bond, and permit the computation of interest upon the penalty of the bond, in the form and under the denomination of damages for the detention of the debt, until the aggregate equals the amount of principal and interest. Beyond this, however, it cannot go, for this is the real debt; and on the other hand, the recovery cannot exceed the amount of the penalty and legal interest, notwithstanding the amount of principal and interest is greater: See cases cited *supra*; *Wyman v. Robinson*, 73 Me. 387; *Simmons v. Almy*, 103 Mass. 36; *Harris v. Clap*, 1 Mass. 308; S. C., 2 Am. Dec. 27; *Leighton v. Brown*, 98 Mass. 516; *Long v. Long*, 16 N. J. Eq. 59; *Brainard v. Jones*, 18 N. Y. 37.

As regards money bonds, this is as far as courts of law of this country will go; they are not able to disregard the penalty altogether, but will give interest upon it as damages for the detention of the debt, which is refused by the English courts of law. Even this departure from the stringent English rule will, however, in most cases, permit of the creditor's recovering his whole debt, principal and interest, for the penalty of the bond with interest will usually be large enough to include this amount.

The English equity courts recognize the justice of giving the creditor the interest upon his principal, though it exceeds the penalty of the bond, and would do so when he comes there for relief, except that they must follow the law, and cannot allow him to recover more in their courts than he can in the common-law courts. But when the obligor comes in for relief from his bond or obligation, these courts, having exclusive jurisdiction in this case, show their appreciation of the real merits of the controversy, and compel him to pay principal and interest, upon the maxim that he who seeks equity must do equity. The equity courts of this country, being equally untrammelled by the forms and fictions of the law courts, meet the question squarely upon its merits, and, as we have seen, regard the penalty of the money bond as having lost its function, and decree the full amount of principal and interest: *Long v. Long*, 16 N. J. Eq. 59; *Tazewell v. Saunders*, 13 Gratt. 368.

This principle of allowing interest as damages for the detention of money prevailing in American jurisprudence, is by the weight and majority of American authorities given a much broader scope and effect, and is applied with similar force to bonds given as security for the performance of covenants or with collateral conditions, and if the damages upon the breach of the bond equal or exceed the amount of the penalty, interest may be given upon the penalty as damages for the detention thereof, similarly as in the case of bonds for the payment of money only; and also, as in the case of money bonds, the amount of the recovery cannot exceed the penalty and interest: *Carter v. Carter*, 4 Day, 30; S. C., 4 Am. Dec. 177 (annuity); *Warner v. Thurlo*, 15 Mass. 154 (replevin); *Bank of Brighton v. Smith*, 12 Allen, 243, 251 (faithful

performance of duties); *Carter v. Thorn*, 18 B. Mon. 613, 620 (guardian); *State v. Wayman*, 2 Gill & J. 281; *Leighton v. Brown*, 88 Mass. 516 (replevin); *Wyman v. Robinson*, 73 Me. 384 (replevin); *Marshall v. Minter*, 43 Miss. 666 (injunction); *Judge of Probate v. Heydock*, 8 N. H. 491 (administrator); *Treadwell v. McKee*, 2 Johns. Cas. 340 (bail bond); *Insurance Co. v. Seckel*, 8 Phila. 92; *Graham v. Bickham*, 2 Yeates, 32; S. C., 1 Am. Dec. 328 (covenant to buy stock at stipulated price); *Walcott v. Harris*, 1 R. I. 404 (bond to convey); *Williams v. Willson*, 1 Vt. 266 (indemnity); *Bank of United States v. Magill*, 1 Paine, 669 (covenant); *United States v. Hills*, 4 Cliff. 618 (official); *United States v. Arnold*, 1 Gall. 348, 360; S. C. affirmed, 9 Cranch, 104 (revenue); *Perit v. Wallis*, 2 Dall. 252 (bond to convey); *United States v. Curtis*, 100 U. S. 119. The principle, in its broader scope, is aptly stated in *Van Rensselaer v. Jewett*, 2 N. Y. 140, which was not a bond case, but an action for damages for a breach of a covenant to pay rent, as follows: "Whenever a debtor is in default for not paying money, delivering property, or rendering services in pursuance of his contract, justice requires that he should indemnify the creditor for the wrong which has been done him; and a just indemnity, though it may sometimes be more, can never be less, than the specified amount of money, or the value of the property or services at the time they should have been paid or rendered, with interest from the time of the default until the obligation is discharged. And if the creditor is obliged to resort to the courts for redress, he ought, in all such cases, to recover interest in addition to the debt, by way of damages." See also *Wyman v. Robinson*, 73 Me. 387; *Brainard v. Jones*, 18 N. Y. 37.

These authorities which hold that interest upon the penalty is recoverable in actions upon bonds for the performance of covenants, and with collateral conditions, very generally regard the penalty as becoming a debt due at the time when the obligors are in default and are liable in the amount of the penalty, and permit interest to be computed upon it from that time as damages for the detention of money due: *Bank of United States v. Magill*, 1 Paine, 669; *Carter v. Carter*, 4 Day, 30; S. C., 4 Am. Dec. 177; *McDowell v. Caldwell*, 2 McCord Ch. 43; S. C., 16 Am. Dec. 635; *Brainard v. Jones*, 18 N. Y. 37; *Wyman v. Robinson*, 73 Me. 387; *Carter v. Thorn*, 18 B. Mon. 613; *Judge of Probate v. Heydock*, 8 N. H. 491, and other cases cited *supra*. As to the time from which interest is computed, see *infra*. A claim should be made in the declaration for damages for the detention, for where a jury is called upon to assess the damages for breaches assigned in the condition of a collateral bond, and are wholly unauthorized by the issues to find damages for the detention of the debt, the recovery must be limited to the penalty of the bond: *State v. Wayman*, 2 Gill & J. 281.

In view of the foregoing reasons and authorities, it is to be concluded that the distinction made by some decisions between money bonds and bonds with other conditions, with regard to the allowance of interest upon the penalty, is not well taken, and that interest is recoverable upon the penalty of bonds given to secure the performance of covenants or with collateral conditions, as well as upon the penalty of bonds for the payment of money only.

Computation and Extent of Recovery of Interest upon Bond to Secure Covenants, and with Collateral Conditions. — Though the actual damages may be greater, the recovery upon the bond cannot exceed the penalty with interest: *Carter v. Carter*, 4 Day, 30; S. C., 4 Am. Dec. 177; *Carter v. Thorn*, 18 B. Mon. 513, 619, 620; *Wyman v. Robinson*, 73 Me. 384; *Marshall v. Minter*, 43 Miss. 666; *Williams v. Willson*, 1 Vt. 266. And on the other hand, in the case of

an injunction bond, though interest may be allowed upon the penalty from the date of the dissolution of the injunction, the whole amount of the recovery cannot go beyond the principal and interest of the judgment the enforcement of which was restrained by the injunction: *Marshall v. Minter*, *supra*. So in the case of a replevin bond, the penal sum with interest may be recovered, provided the actual damages amount to so much: *Warner v. Thurlo*, 15 Mass. 154.

The penalty forms a principal upon which interest is computed only when there is a forfeiture of the penalty: *Carter v. Carter*, 4 Day, 30; S. C., 4 Am. Dec. 177; or when the amount of actual damages resulting from the breach of the condition of the bond equals or exceeds the amount of the penal sum: *Ives v. Merchants' Bank*, 12 How. 164; *Washington County Ins. Co. v. Colton*, 26 Conn. 42; *Carter v. Thorn*, 18 B. Mon. 613, 619, 620; *Warner v. Thurlo*, 15 Mass. 154; *Bank of Brighton v. Smith*, 12 Allen, 243, 251; *Insurance Co. v. Seckel*, 8 Phila. 92.

On the other hand, when the damages are less than the penalty, interest is computed on them, it is said, until the amount equals the penalty: *Bank of Brighton v. Smith*, 12 Allen, 243, 251. No reason is perceived, however, why the same rule should not obtain here that prevails in the case of money bonds, namely, that interest be computed upon the actual damages, when they are less than the penalty, until principal and interest amount to the sum of the penalty and interest; for this sum is the limit of recovery, and may as well serve as a limit when the damages are less as when they are more than the penalty. The rule of the law courts will be observed, of course, and when the actual damages and interest amount to the penalty, the remaining interest will be awarded in the form of interest upon the penalty.

DISTINCTION TAKEN BY SOME AUTHORITIES BETWEEN PRINCIPAL AND SURETIES.—Another distinction is maintained by a very considerable number of authorities between the principal and sureties upon a penal bond; and though, as to the former, it is admitted that interest upon the penal sum is recoverable, as to the latter the doctrine that the obligation of the surety is *strictissimi juris* is invoked, and it is therefrom concluded and maintained that, as to him, the penalty is the absolute limit of recovery, beyond which it is impossible to go even for the purpose of awarding interest thereon: *Leggett v. Humphries*, 21 How. 75; *McGill v. Bank*, 12 Wheat. 514; *Lawrence v. United States*, 2 McLean, 581; *Anely v. Mock*, 8 Ala. 444, 452; *Seamans v. White*, 8 Id. 656 (but see *Tyson v. Sanderson*, 45 Id. 364); *McCoy v. Elder*, 2 Blackf. 183; *State v. Sandusky*, 46 Mo. 377; *Pitts v. Tilden*, 2 Mass. 118 (but see *Harris v. Clap*, 1 Id. 308; S. C., 2 Am. Dec. 27); *Bank of Brighton v. Smith*, 12 Allen, 243, 251; *Clark v. Bush*, 3 Cow. 151, 158 (this case is followed in *Fairlie v. Lawton*, 5 Id. 424, and *Rayner v. Clark*, 7 Barb. 581; and see *Mower v. Kip*, 6 Paige, 88; S. C., 29 Am. Dec. 748, 751; and is overruled in *Brainard v. Jones*, 18 N. Y. 37, which case settles the law in New York in favor of allowing interest on the penalty against sureties; but see also *Dickerson v. Cook*, 3 Duer, 324); *State v. Blakemore*, 7 Heisk. 638, 657.

It is true as a general principle of law that a surety is not liable beyond the penalty of his bond which he has fixed as the limit of his liability: *White v. Sealy*, 1 Doug. 49; *Ex parte Rushforth*, 10 Ves. 409; *Farrar v. United States*, 5 Pet. 372; *Allen v. Grider*, 24 Ark. 271; *Ward v. Buell*, 18 Ind. 104; S. C., 81 Am. Dec. 349; *Mower v. Kip*, 6 Paige, 88; S. C., 29 Am. Dec. 748, 751; *State v. Polk*, 14 Lea, 1; and that the principal may sometimes be liable in a greater sum than the sureties. Such may be the case upon the breach of official bonds and other bonds for the faithful performance of duties where

the principal will be liable in the full amount of failure or defalcation though it exceed the penalty of the bond: See *Farrar v. United States*, 5 Pet. 372; and this sometimes occurs where the actual damages resulting from the breach of a covenant are greater than the penal sum of the bond: Note to *Graham v. Bickham*, 1 Am. Dec. 339. But interest upon the penalty as damages for the detention thereof is not to be regarded as a portion of the damages with respect to which the surety has restricted his liability. This is a damage which the surety, by his own default, causes the obligee to suffer. He may save himself from liability for interest, and the obligee from the damage of detention or delay, by paying the amount in which he is liable immediately upon its becoming due from him. If he fails to do so, this is a default outside of the restrictions and stipulations of the bond, and creates a liability additional to that therein contained. And therefore to hold the surety liable for damages for detention, that is, for interest upon the penalty (it being understood, of course, that the damages accruing from the breach of the condition of the bond equal or exceed the penalty), is no more an infringement of the rule that the penalty is the limit of his liability than is the allowance of costs against him in addition to the penal sum; "for costs are as much of the nature of a penalty as interest is when interest is allowed as damages": *Wyman v. Robinson*, 73 Me. 388, *per Peters, J.*; and costs are allowed as a matter of course: *Branscombe v. Scarbrough*, 6 Ad. & E., N. S., 13; *State v. Homey*, 44 Wis. 615, 621. This is the view taken by the majority and weight of authority; it is supported by the better reason, and therefore the distinction above adverted to between principal and surety must be regarded as not well taken: *United States v. Hills*, 4 Cliff. 620, 621 (official bond); *The Wanata*, 95 U. S. 612; *Ives v. Merchants' Bank*, 12 How. 164 (appeal); *Tyson v. Sanderson*, 45 Ala. 364 (guardian); *Washington County Ins. Co. v. Colton*, 26 Conn. 42 (faithful performance of duties); *Westbrook v. Moore*, 59 Ga. 204 (payment of judgment recovered); *Hughes v. Wickliff*, 11 B. Mon. 202 (injunction); *Carter v. Thorn*, 18 Id. 613 (guardian); *Wyman v. Robinson*, 73 Me. 384 (replevin); *Maryland v. Wayman*, 2 Gill & J. 279; *Harris v. Clap*, 1 Mass. 308; S. C., 2 Am. Dec. 27 (to pay award); *Bank of Brighton v. Smith*, 12 Allen, 243, 251 (faithful performance of duties); *State v. Sandusky*, 46 Mo. 377 (payment of money); *Long v. Long*, 16 N. J. Eq. 59 (payment of money); *Treadwell v. McKee*, 2 Johns. Cas. 340 (bail bond); *Mower v. Kip*, 6 Paige, 88; S. C., 29 Am. Dec. 748, 751 (payment of money); *Brainard v. Jones*, 18 N. Y. 35 (replevin); in this case Comstock, J., says: "We have not overlooked other cases in this state," etc., but they were not well considered, etc.; *Perit v. Wallis*, 2 Dall. 252 (payment of money); *Clark v. Wilkinson*, 59 Wis. 543.

The principle which we have previously spoken of, and which awards interest upon the penal sum as damages for its detention, obtains in the case of sureties equally as in the case of principals; for there is no reason why the former should be relieved from the operation of the rule, which is an eminently just one, and quite general in its application: *Brainard v. Jones*, 18 N. Y. 37; *Perit v. Wallis*, 2 Dall. 252. As is said *per* Comstock, J., in *Brainard v. Jones*, *supra*: "It may be a reasonable doctrine that a surety who has bound himself under a fixed penalty for the payment of money, or some other act to be done by a third person, has marked the utmost limit of his own liability. But when the time has come for him to discharge that liability, and he neglects or refuses to do so, it is equally reasonable and altogether just that he should compensate the creditor for the delay which he has interposed. The legal measure of this compensation is interest on the sum which he ought to have paid from the time when the payment was due from him."

So Peters, J., in the late case of *Wyman v. Robinson*, 73 Me. 387: "It is commonly said that the damages cannot exceed the penalty of a bond. Rightly understood, the statement is true. But what is the penalty in a bond for the payment of damages? It is the amount which the obligors agree to pay, if the whole penalty be needed for the purpose, for the damages sustained by the obligee by a breach of the bond, the amount to be paid as soon as the breach occurs. The obligee is to have the penalty at a particular and definite time. Immediately upon a breach of the bond the penalty is due to him. If he gets it then, he gets what the contract provides; if he gets it later, he gets less than what the contract provides. If, then, the penalty be paid after the breach, interest should be added for the detention of the penalty, to make it equivalent to a payment at the date of the breach. After the penalty is forfeited, it becomes a debt due. The sureties then stand in the relation of principals to the obligee, owing him so much money then due. To ascertain the precise sum may require calculation, — but that is certain which can be made certain. The rule common to contracts generally applies: that where money is due and there is a default in payment, interest is to be added as damages. The defendants should pay damages for detaining damages which they bound themselves to pay at a prior date. The penalty of the bond is payable because the principal did not fulfill his obligation; the interest is the penalty upon the sureties for not fulfilling theirs."

FROM WHAT TIME INTEREST IS TO BE COMPUTED is a very important question, and one upon which the authorities are not in unison. Interest is undoubtedly to be computed from the time when the sum becomes due and the defendant was in default: *Brainard v. Jones*, 18 N. Y. 37. One line of authorities hold that this time dates from the demand made upon the obligees: *Lyon v. Clark*, 8 Id. 157; *Mower v. Kip*, 6 Paige, 88; S. C., 29 Am. Dec. 748, 751; *Maryland v. Wayman*, 2 Gill & J. 279; *Leighton v. Brown*, 98 Mass. 516; *Walcott v. Harris*, 1 R. I. 404; and if there has been no demand made, and no acknowledgment on the part of the surety that the sum claimed is due, then interest runs from the commencement of the suit on the bond, that is, from the date of the writ, this being a demand: *Bank of United States v. Magill*, 1 Paine, 661; *Ives v. Merchants' Bank*, 12 How. 164; *United States v. Hills*, 4 Cliff. 618; *Warner v. Thurlo*, 15 Mass. 154; *Bank of Brighton v. Smith*, 12 Allen, 243, 251; *Simmons v. Almy*, 103 Mass. 36; *Boyd v. Boyd*, 1 Watts, 365; *United States v. Curtis*, 100 U. S. 119. The attitude of these authorities will appear from an examination of the case of *Ives v. Merchants' Bank*, 12 How. 165. The case was an action of debt upon an appeal bond where the amount of damages adjudged in the appellate court exceeded the penal sum of the bond. And it was said that the judgment was conclusive against the principal of the bond, and equally conclusive of the fact that the surety was bound to pay it to the extent of the penal sum; and "this amount was due by the bond, which could have been at once enforced by suit, and if the supreme court had been vested with power to render judgment against the surety on the appeal bond, as is the case in some of the states, no reason would seem to exist why the bonds should not bear interest from the date of judgment in the supreme court against the surety as well as against the principal. But as Ives only guaranteed the payment of damages, and it was a duty imposed on the principal to pay the entire judgment, the moderate rule has been applied of requiring interest from the time that demand of payment was made by suit; a rule now so generally established in similar cases by state courts of high authority that this court could not violate it without manifest impropriety."

The other line of authorities permit the computation of interest from the time of the breach of the condition of the bond, irrespective of any demand made: *United States v. Arnold*, 1 Gall. 348, 360; affirmed in 9 Cranch, 104; *Tyson v. Sanderson*, 45 Ala. 364; *Carter v. Carter*, 4 Day, 30; S. C., 4 Am. Dec. 177; *Washington County Ins. Co. v. Colton*, 26 Conn. 42; *Carter v. Thorn*, 18 B. Mon. 613; *Wyman v. Robinson*, 73 Me. 384; *Harris v. Clap*, 1 Mass. 308; S. C., 2 Am. Dec. 27; *Brainard v. Jones*, 18 N. Y. 36; *Insurance Co. v. Seckel*, 8 Phila. 92; *Perit v. Wallis*, 2 Dall. 252. Thus upon an injunction bond interest may be computed upon the penalty from the time of the dissolution of the injunction, that being the time of the breach: *Hughes v. Wickliff*, 11 B. Mon. 202; *Marshall v. Minter*, 43 Miss. 666; upon a bond for the faithful performance of duties by an officer of a corporation, from the time when the officer failed to pay over the moneys received by him: *Washington County Ins. Co. v. Colton*, 26 Conn. 42; upon a guardian's bond, from the date of the rendition of a judgment ascertaining the sum due from the guardian: *Tyson v. Sanderson*, 45 Ala. 364; or where it is the duty of a guardian to pay his ward the money in his hands upon his attaining his majority, his failure to do so is a breach of the condition of his bond: *Carter v. Thorn*, 18 B. Mon. 613, 620; upon an administrator's bond, from the date of the settlement of his account and the finding of a balance in his hands, and an order to him to pay it over: *Judge of Probate v. Heydock*, 8 N. H. 491; upon a replevin bond, from the rendition of the judgment in the replevin suit: *Brainard v. Jones*, 18 N. Y. 36; *Wyman v. Robinson*, 73 Me. 390 (in *Warner v. Tharlo*, 15 Mass. 154, it is held that interest cannot be computed except from the commencement of suit upon the bond; this case is one of the first-mentioned class of authorities); upon a bond to convey, from the time of the failure to convey: *Perit v. Wallis*, 2 Dall. 252.

This second class of authorities seems to rest upon the best reason. There is no reason why a demand should be required in the case of obligations by specialty any more than in the case of any other class of obligations. It may be very proper, in some cases, to require demand before interest should begin to run, as where the surety cannot otherwise become aware of the breach: See *United States v. Hills*, 4 Cliff. 618. But ordinarily both the sureties and their principals are equally well informed as to the date of the breach, and if not, it is their duty to be informed, and they are negligent in not looking out for their own interests, since by a tender at the time of the amount due, or of the penalty, if the damages amount to so much, they may save themselves from liability for interest. In *Wyman v. Robinson*, 73 Me. 390, it is said: "In some cases courts appear to have been reluctant to allow the interest to commence before the date of the writ upon the penal bond. But why not, logically, from the default as well as from the date of the writ? Interest is allowable from the date of a writ only because a defendant is considered in default from that date. Why not to be reckoned from an earlier date if the default antedates the writ? . . . Of course, there may be instances where the penalty is not due till demanded, and bringing the action may be the first demand. But in the case now presented for our opinion [debt upon a replevin bond] a breach is evidenced by the judgment in a previous action. The sureties knew then as well as now just what their obligation consisted of": *Wyman v. Robinson*, 73 Me. 387, 390. It is also to be remarked that the former class of authorities depend almost wholly upon precedent, and not upon principle.

WHERE INTEREST IS DENIED IN GENERAL BEYOND PENALTY THERE ARE SOME EXCEPTIONS TO RULE. One exception we have already adverted to,

where equity compels the obligor, when he is a complainant, to do equity, and pay the full amount of principal and interest.

Creditor having Two Securities, Bond and Mortgage, may, if he resorts to his mortgage, recover interest beyond the penalty of the bond, even in England: *Clarke v. Lord Abingdon*, 17 Ves. 106; *Hale v. Thomas*, 1 Vern. 351; *Kerwans v. Blake*, 4 Brown Parl. C. 532; *Pitts v. Tilden*, 2 Mass. 118; *Mower v. Kip*, 6 Paige, 88; S. C., 29 Am. Dec. 748.

So where Judgment is Obtained for Penalty of the bond, and an action is brought upon the judgment, interest may be recovered in damages beyond the penalty of the bond: *Clarke v. Seaton*, 6 Ves. 411; *McClure v. Dunkin*, 1 East, 436; *Smith v. Vanderhost*, 1 McCord, 328; S. C., 10 Am. Dec. 674; *Bonsall v. Taylor*, 1 McCord, 503, 511. And it is held that, in an action upon the bond, where the damages have been assessed to the whole amount of the penalty, execution may be levied for the interest accruing thereon after the rendition of the judgment: *State v. Wylie*, 2 Strob. 114.

So where Judgment is Rendered by Default in an action of debt on a penal bond, interest may be taxed by way of damages beyond the penalty: *Blackmore v. Flemyng*, 7 Term Rep. 446; *Holdipp v. Otway*, 2 Saund. 107; *Moffatt v. Barnes*, 3 Caines, 49, note a.

DANN v. CUDNEY.

[18 MICHIGAN, 239.]

MARRIED WOMAN IS ESTOPPED FROM ASSERTING HER TITLE to horse which belonged to her, and which her husband sold without her authority, if she was informed of the sale before payment was made, and had ample opportunity to give the purchaser notice of her rights, but failed to do so until after he had made payment to the husband.

MARRIED WOMAN SUING IN TROVER FOR HORSE SOLD BY HER HUSBAND to the defendant, without her authority, may be asked on cross-examination as to her failure to give the purchaser notice of her rights, she having testified in chief that the horse belonged to her, and that she had never sold it nor authorized her husband to sell it.

INSTRUCTION WILL NOT BE PRONOUNCED ERRONEOUS, AS TENDING TO MISLEAD JURY, where the record does not purport to give the whole of it, notwithstanding the portion given is misleading.

TROVER for the conversion of a horse. The plea was the general issue, with notice of special matter. The opinion states the case.

John B. Dillingham, for the plaintiff in error.

H. Joslin, for the defendant in error.

By Court, CHRISTIANCY, J. This was an action of trover, brought by defendant in error, who was a married woman, for the wrongful conversion of a horse. She had allowed her husband to use the horse, and he had driven him, with his own, from Canada to East Saginaw, about the 1st of November.

1862, where, within two days after, he sold this and the other horse to one John Sevenoakes, who, on the twelfth day of the same month, executed a chattel mortgage of the horse to Dann, the defendant below, under which Dann subsequently (but how soon does not appear) took possession, which is the conversion complained of.

The wife had never given her husband any previous authority to sell the horse; but being with her husband at East Saginaw, they both went, the next morning after the sale, to the house of Sevenoakes, and took breakfast; and while on the way to the house for that purpose, the husband, she says, told her he had sold the horse to Sevenoakes. She was then asked by the defendant whether, at any time between that morning and the time when the horse was taken on the chattel mortgage, she informed Sevenoakes that the horse was her property, and that her husband had no right to sell him.

This question was objected to on the part of the plaintiff and excluded by the court. The testimony already given by her tended strongly to show that she had a good opportunity to have given this notice to Sevenoakes the next morning after the sale, and her subsequent testimony, as well of that of Sevenoakes, tended also to show that this opportunity continued for weeks afterwards, and there was no evidence of a contrary tendency. Her own testimony also shows—and there seems to have been no dispute about the fact—that she also knew that Sevenoakes had not yet paid for the horse at the time when she was informed of the sale. Had she been informed not only of the sale of the horse, but that he had been paid for, she might not, perhaps, have been bound to any diligence in making known her right, as her silence might not then lead the purchaser into any further act to his prejudice; but knowing that the husband had assumed to sell the horse as his own, under circumstances not calculated to excite any suspicion of his right, and that payment had not yet been made, she must also have known that her silence would still leave the purchaser under the belief that the horse belonged to the husband, and that he was at liberty to pay the husband, or deal with him as the owner. She could not, then, honestly neglect any fair or convenient opportunity to give early notice of her right, and of her husband's want of authority, unless she intended to be bound by any payment which might be made to her husband, or any other arrangement the purchaser might make with him in the mean time. She must have known that

payment to the husband would be the natural result of her neglect to give the notice. And if, under such circumstances, she, having a good opportunity to give the notice, yet refrained from giving it until payment had been made to the husband, or the purchaser had parted with property on the faith of the husband's right, she should be bound by the acts of her husband, and suffer the consequences of the error into which her neglect had led the purchaser; and to allow her to recover the price again, after the purchaser had thus paid for it, would be to aid her in the commission of a gross fraud. Under such circumstances, upon every principle of justice, she would be as much estopped as if she had stood by at the sale without objection, and permitted the husband to sell the horse as his own.

The defendant therefore had a right to show that he had thus been led into paying the husband for the horse, or parting with property on the faith of the husband's right, in consequence of her negligence in giving notice of her rights when she had a fair opportunity to do so, and when she knew that payment had not been made. He had therefore the right to go fully into the question of delay in giving the notice, her opportunities for giving it, her knowledge that payment had not been made, and the fact of his paying or parting with property on the faith of the husband's right; and being on cross-examination, it was entirely immaterial which of these facts he should show first. The question proposed was entirely legitimate on cross-examination, as she had testified in chief that she had never sold the horse, nor authorized the husband to sell him, and that, if she had her rights, the horse would still have been in her possession. The court therefore erred in overruling the question.

It is clear, from the subsequent testimony in the cause, that this error was calculated materially to prejudice the defense, as it appeared from the testimony of Sevenoakes, which was confirmed by that of the husband, and which was not disputed, that during the time to which the question referred,—that is, between the morning when she was informed of the sale and the time when the horse was taken on the chattel mortgage,—Sevenoakes did actually pay the husband for the horse through another trade, which was made between them about the twentieth day of November, and the note the husband had taken for the horse was given up.

As the record does not purport to give the whole charge, we

cannot say it was erroneous. The charge, as a whole, may have been in accordance with the principles above laid down. But if the whole charge is stated in the record, it was inapplicable to the case, and calculated to mislead the jury. The jury should have been directly told that if they should find that the plaintiff, having notice of the sale, and that payment was still to be made, neglected to give notice of her rights when she had convenient opportunity to do so, she took upon herself the risk of payment being made to the husband in the mean time; and if they should find that the purchaser had, in good faith, continued to deal with the husband as the only party in interest, and had paid him for the horse, she would be bound by the acts of her husband as if they had been done by herself.

The judgment must be reversed, with costs, and a new trial granted.

COOLEY, J., concurred.

MARTIN, C. J., did not sit in this case.

CAMPBELL, J., dissented.

WITNESS MAY BE ASKED ON CROSS-EXAMINATION TO GIVE IN DETAIL circumstances surrounding fact to which he has testified, and tending to disprove its existence: *Phillips v. Howell*, 84 Am. Dec. 373; and may be examined fully as to his knowledge touching any and all facts material to the case: *Fralick v. Presley*, 65 Id. 413, and note 418; see also *Davis v. Simma*, 81 Id. 462. The principal case is cited to the point that on cross-examination it is permissible to go as fully into the subject as may be necessary to draw from the witness all he may know concerning the transaction about which he has testified on the direct examination, and to put before the jury any pertinent facts which will have a tendency to controvert the testimony which has been given by the witness in favor of the party calling him: *Detroit and Milwaukee R. R. Co. v. Van Steinburg*, 17 Mich. 109; *Turner v. Grand Rapids*, 20 Id. 375.

MARRIED WOMAN MAY BE ESTOPPED by fraudulent representations, or by concealment, as to her separate property: *Cravens v. Booth*, 58 Am. Dec. 112, and note 114-117, treating this subject at length; *Bradley v. Snyder*, 58 Id. 564, and note 569; *Wiseman v. Macy*, 83 Id. 316, and note 318; but see *Lowell v. Daniels*, 61 Id. 448, and note 453; *Morrison v. Wilson*, 73 Id. 593, and note 599; *Griffin v. Sheffield*, 77 Id. 646, note 651; *Fahie v. Pressey*, 80 Id. 401; *Keen v. Coleman*, 80 Id. 524, note 525. The principal case is cited to the point that equity recognizes the separate existence of the wife, even under all the disabilities of coverture, and regards her as a rational and responsible subject of its jurisdiction, entitled to its protection and amenable to the decrees of a court of conscience, and that consequently she may bind herself by means of equitable estoppel: *Rosenthal v. Mayhugh*, 33 Ohio St. 168. So where a wife is present at a sale of personal property by her husband, and

assented to it, this is sufficient to cut off her rights where her written consent is not necessary: *Holman v. Gillette*, 24 Mich. 416. The principal case is also cited to the point that where a creditor, by attaching property and by his representations, leads another creditor to suppose that he also has a right to attach it, and he does so, the first is estopped as against him from thereafter claiming that he himself was the owner of it: *Vanneter v. Croseman*, 42 Id. 468

GIVING OR REFUSING INSTRUCTION NOT EXCEPTED TO NOR FORMING PART OF RECORD will not be noticed in appellate court: *Price v. State*, 72 Am. Dec. 195, and note 201.

LADUE v. DETROIT AND MILWAUKEE R. R. Co.

[18 MICHIGAN, 380.]

MORTGAGE OF LAND CONVEYS NO TITLE, LEGAL OR EQUITABLE, TO MORTGAGEE, but the title remains in the mortgagor until foreclosure and sale, and the mortgage is but a security in the nature of a specific lien for the debt.

MORTGAGE TO SECURE FUTURE ADVANCES WHICH IT IS OPTIONAL WITH MORTGAGEE to make or not is not effectual as an encumbrance until the advances are made, and constitutes no lien for advances made after the mortgagor has conveyed the property and the deed has been recorded.

RECORD OF MORTGAGE TO SECURE FUTURE ADVANCES WHICH ARE OPTIONAL WITH MORTGAGEE puts a purchaser from the mortgagor upon notice only as to such advances as are made before the record of his deed.

MORTGAGE INSTRUMENT WITHOUT ANY DEBT, LIABILITY, OR OBLIGATION SECURED BY IT can have no present legal effect as a mortgage or encumbrance upon the land; and the mere recording of the instrument cannot make it such, nor have any greater effect than to put a purchaser or encumbrancer upon inquiry as to whether an advance has been made or a liability incurred for which it may stand as security.

RECORD OF DEED FROM MORTGAGOR OF MORTGAGE TO SECURE FUTURE ADVANCES which are optional with the mortgagee is sufficient notice to the latter not to incur further liabilities on the faith of the mortgage, and the purchaser is under no obligation to give the mortgagee actual notice of his deed.

BILL in equity to foreclose a mortgage. The opinion states the case.

G. V. N. Lothrop, for the complainant.

H. H. Emmons and A. Pond, for the defendants.

By Court, CHRISTIANCY, J. The mortgage which the bill in this case seeks to foreclose was executed by John Ladue to the complainant and Francis E. Eldred, composing the firm of Ladue and Eldred, on the fourth day of August, 1852, to secure and indemnify the firm against any indorsements which might be made, or liabilities to be incurred, by them

as sureties for John Ladue, as well as for any moneys they might advance for him, according to the condition of a bond to which the mortgage was collateral, and which was of like effect. There was nothing in the papers or in the arrangement between the parties which bound Ladue and Eldred to make any advances or to indorse any paper for John Ladue, or to incur any liability for him; nor was the latter bound to accept any such accommodation. The effect of the arrangement was that such advances and liabilities, if made or incurred, would be purely optional on the part of the mortgagees. This mortgage was duly recorded on the day of its date. On the ninth day of May, 1853, John Ladue, the mortgagor, sold and conveyed the mortgaged premises to Charles Howard (through whom the railroad company derive their title) by warranty deed, which was duly recorded on the ninth day of July, 1853. John Ladue, however, remained in possession, using the premises as before, until his death, December 4, 1854.

No claim is made for any advances made by Ladue and Eldred to John Ladue, but the whole claim under the mortgage is based upon indorsements made for him by the mortgagees, which have been paid by Andrew Ladue, one of the complainants, and all these indorsements, as shown by the proofs, were made some time after the sale to Howard and the recording of his deed. Whatever indorsements were made prior to that time seem to have been taken up by John Ladue; and it does not satisfactorily appear by the evidence that any of these indorsements made since the recording of Howard's deed were made in renewal of paper indorsed by them previous to that time. No indorsements made prior to the recording of Howard's deed are in any way involved, and the case may therefore be considered in all respects in the same light as if no such previous indorsements had ever been made, especially as it does not appear that, at the time of the sale to Howard, or the recording of his deed, there was any existing unsatisfied indorsement, or any subsisting liability, inchoate or otherwise, incurred by the mortgagees for the mortgagor.

The mortgagees, at the time of the indorsements in question, had no notice of the deed to Howard, unless the record of that deed is to be considered such notice, the deed having been some months previously recorded. The validity of the mortgage as between the parties, for any amount of advances which might be made or liabilities incurred under it, after

they should have been thus made or incurred, is not questioned by the defendants; nor is it denied that the record of it would be sufficient notice to subsequent purchasers and encumbrancers of the amount which the mortgagees might actually have advanced or indorsed for the mortgagor; or in other words, the amount for which it had become an actual and subsisting security at the time when the question of notice of the mortgage became material, — which, for the purposes of this case, is admitted to cover the period from the purchase by Howard down to the time of the recording of his deed, the record of which is claimed to be notice to the mortgagees as regards any advances made to or liabilities incurred by them for the mortgagor after the recording of the deed. Nor is it denied that if the mortgagees, by the contracts or arrangements between them and the mortgagor (to secure which, on the part of the latter, was the object of the mortgage), had been bound to make advances or to indorse for the mortgagor, the record of the mortgage would have been full notice to Howard, and the mortgage would have been good against him, though the advances were not in fact made or the paper indorsed until after the deed to him and actual notice of that deed to the mortgagees.

The defendants also admit that the result would be the same under this mortgage, as to any advances made or paper indorsed by the mortgagees for the mortgagor, before they had actual or constructive notice of the sale and deed to Howard; but they insist that, as there was not at the time of Howard's purchase or the recording of his deed any debt of the mortgagor, or any liability incurred for him by the mortgagees, absolute or inchoate, nor any obligation on their part to incur such liability, the mortgage was not then an encumbrance in fact or in legal effect; that it could only become such from the time when the advances or indorsements were actually made; and it being optional with the mortgagees whether they would make any such advances or indorsements; and the indorsements being made subsequent to the recording of Howard's deed, the mortgage is, in legal effect, subsequent to the deed, and the record of the deed was notice to the mortgagees of Howard's rights.

The first question, therefore, for our determination is, What was the legal effect of the mortgage (if any) upon the land at the time of the recording of the mortgagor's deed to Howard?

That a mortgage in this state, both at law and in equity,

even when given to secure a debt actually subsisting at its date, conveys no title of the land to the mortgagee (especially since the statute of 1843 taking away ejectment by the mortgagee), that the title remains in the mortgagor until foreclosure and sale, and that the mortgage is but a security, in the nature of a specific lien, for the debt, has been already settled by the decisions of this court: *Dougherty v. Randall*, 8 Mich. 581; *Caruthers v. Humphrey*, 12 Id. 270; and *Crippen v. Morrison*, 13 Id. 23. This is in accordance with the well-settled law of the state of New York, from which our system of law in regard to mortgages has been in a great measure derived: *Jackson v. Willard*, 4 Johns. 41; *Collins v. Torry*, 7 Id. 278 [5 Am. Dec. 273]; *Runyan v. Mersereau*, 11 Id. 534 [6 Am. Dec. 393]; *Gardner v. Heartt*, 3 Denio, 232; *Edwards v. Farmers' Ins. Co.*, 21 Wend. 467; *Waring v. Smyth*, 2 Barb. Ch. 119 [47 Am. Dec. 299]; *Bryan v. Butts*, 27 Barb. 504; *Syracuse City Bank v. Tallman*, 31 Id. 201; *Kortright v. Cady*, 21 N. Y. 343 [78 Am. Dec. 145].

This view of a mortgage is also sustained by several of the English decisions, and substantially this is the more generally received American doctrine, as will sufficiently appear by reference to the decisions, most of which have been carefully collected in the elaborate brief of the defendant's counsel, but which are too numerous to be cited here. There are exceptions and peculiarities in particular states, in some of which, as in some of the New England states and Kentucky, the old idea of an estate upon a condition continues to rankle in the law of mortgages, like a foreign substance in the living organism, but is rapidly being eliminated and thrown off by the healthy action of the courts under a more vigorous application of plain common sense. But few of the incidents of this antiquated doctrine are now recognized in most of the states of this Union. The title, for nearly all practical purposes, being now recognized, both at law and in equity, as continuing in the mortgagor, and the mortgage as a mere lien for the security of the debt. But wherever any vestige of this now nearly exploded idea continues to prevail in connection with the more liberal doctrines of modern times which the courts have been compelled from time to time to adopt, it serves only to confuse and deform the law of mortgages by various anomalies and inconsistencies, making it a chaos of arbitrary and discordant rules resting upon no broad or just principle; while by recognizing the mortgage as a mere lien for the security of the debt,

at law as well as in equity, and thus giving it effect according to the real understanding and intention of the parties, the law of mortgages becomes at once a system of homogeneous principles, easily understood and applied, and just in their operation.

A mortgage, then, being a mere security for the debt or liability secured by it, it necessarily results,—

1. That the debt or liability secured is the principal, and the mortgage but an incident or accessory: See cases above cited; also *Richards v. Syms*, Barn. Ch. 90; *Roath v. Smith*, 5 Conn. 133; *Lucas v. Harris*, 20 Ill. 165; *Vansant v. Allmon*, 23 Id. 30; *Ord v. McKee*, 5 Cal. 515; *Ellison v. Daniels*, 11 N. H. 274; *Hughes v. Edwards*, 9 Wheat. 489; *Green v. Hart*, 1 Johns. 580; *McGan v. Marshall*, 7 Humph. 121; 4 Kent's Com. 193; *McMillan v. Richards*, 9 Cal. 365 [70 Am. Dec. 655].

2. That anything which transfers the debt (though by parol or mere delivery) transfers the mortgage with it: See cases above cited, especially *Vansant v. Allmon*, 23 Ill. 30; *Ord v. McKee*, 5 Cal. 515; *Ellison v. Daniels*, 11 N. H. 274; see also *Martin v. Mowlin*, 2 Burr. 978; *Clark v. Beach*, 6 Conn. 164; *Southerin v. Mendurm*, 5 N. H. 420; *Wilson v. Kimball*, 27 Id. 300; *Blake v. Williams*, 36 Id. 39; *Crow v. Vance*, 4 Iowa, 434; *Clearwater v. Rose*, 1 Blackf. 137; *Jackson v. Blodget*, 5 Cow. 202; *Mechanics' Bank v. Niagara Bank*, 9 Wend. 410; *Green v. Hart*, 1 Johns. 580.

3. That an assignment of the mortgage without the debt is a mere nullity: *Ellison v. Daniels*, 11 N. H. 274; *Jackson v. Bronson*, 19 Johns. 325; *Wilson v. Troup*, 2 Cow. 195 [14 Am. Dec. 458]; *Weeks v. Eaton*, 15 N. H. 145; *Peters v. Jamestown Bridge Co.*, 5 Cal. 334 [63 Am. Dec. 134]; *Webb v. Flanders*, 32 Me. 175; 4 Kent's Com. 193; *Thayer v. Campbell*, 9 Mo. 277.

4. That payment, release, or anything which extinguishes the debt *ipso facto* extinguishes the mortgage: *Lane v. Shears*, 1 Wend. 433; *Sherman v. Sherman*, 3 Ind. 337; *Ryan v. Dunlap*, 17 Ill. 40 [63 Am. Dec. 334]; *Armitage v. Wickliffe*, 12 B. Mon. 496; *Paxon v. Paul*, 3 Harr. & McH. 399; *Perkins v. Dibble*, 10 Ohio, 434 [36 Am. Dec. 97]; *Breckenridge v. Ormsby*, 1 J. J. Marsh. 257 [19 Am. Dec. 71]; *Cameron v. Irwin*, 5 Hill, 272. It will be seen from these authorities that some, if not all, of these incidents or characteristics of a mortgage are recognized by some of the courts, which still hold the mortgage to be a conveyance of the estate,—an idea, however, with which they are utterly inconsistent, as such incidents can only

logically flow from the doctrine that the estate still remains in the mortgagor, and that the mortgage is but a lien for security of a debt.

These propositions being established, the necessary result is that the mortgage instrument, without any debt, liability, or obligation secured by it, can have no present legal effect as a mortgage or an encumbrance upon the land. It is but a shadow without a substance, an incident without a principal; and it can make no difference in the result whether there has once been a debt or liability which has been satisfied, or whether the debt or liability to be secured has not yet been created, and it requires, as in this case, some future agreement of the parties to give it existence. At most, the difference is only between the nonentity which follows annihilation and that which precedes existence.

The instrument can only take effect as a mortgage or encumbrance from the time when some debt or liability shall be created, or some binding contract is made, which is to be secured by it. Until this takes place, neither the land nor the parties, nor third persons are bound by it. It constitutes of itself no binding contract. Either party may disregard or repudiate it at his pleasure. It is but a part of an arrangement; merely contemplated as probable, and which can only be rendered effectual by the future consent and further acts of the parties. It is but a kind of conditional proposition, neither binding nor intended to bind either of the parties till subsequently assented to or adopted by both.

Though the question does not properly arise here, we take it for granted, for the purposes of this case, that the mortgage instrument may, if properly executed, go upon the record, and become effectual between the parties when the debt or liability contemplated shall have been created, unless the mortgagor has in the mean time—as he had a clear right to do—parted with the title and deprived himself of the power of creating an encumbrance upon it. But the mere recording of the instrument would not make it a mortgage or encumbrance in legal effect if it were not so before, nor give it a greater effect as to third persons than it had between the parties. The record of such an instrument might be an intimation that advances and indorsements were contemplated as probable, and that they might therefore have been already made; and for this reason might, to this extent, properly put a purchaser or encumbrancer upon inquiry. But unless it is to have a greater

effect than the record of other mortgages, it could be notice only of such facts as might have been ascertained by inspection of the instrument and papers referred to, and by inquiry; in other words, by a knowledge of the rights of the parties in respect to the land at the time notice became material, which, for the purposes of this case, as already explained, we shall assume to be from the time of Howard's purchase down to the time when he recorded his deed. The result must therefore be the same here as if there had been no record. Had Howard made the most diligent inquiry in connection with the inspection of the papers, what facts could he have ascertained? Nothing material to the rights of the parties or to his own rights beyond the facts already stated,—nothing which in any manner interfered with the mortgagor's absolute right of sale. He would have learned, in fact, that the instrument recorded as a mortgage was not in legal effect a mortgage, nor upon any principle of justice or equity an encumbrance upon the land; that either party had a perfect right to refuse to give that future assent, or to enter into that future contract or arrangement by which alone it could acquire vitality or force. He had therefore a just right to conclude that the record of his deed would be fair notice to the persons mentioned as mortgagees, as the instrument could only become a mortgage subsequent to that time, and then only by reason of some future debt or liability, which it required the further assent and agreement of the parties to create. He had a right to conclude that upon every sound principle Ladue and Eldred would, as prudent men, be as likely, and ought to be as much bound, to look to the record before making any such advances or indorsing paper for the mortgagor as if a new mortgage for the purpose were to be taken at the time, since they had the same option to make the advances or not as any new mortgagee would have had, and ought therefore to be governed by the same prudential considerations. And they must be presumed to have known that John Ladue, until such advances or indorsements were made by them, had full power to sell the land free from any encumbrance of the mortgage instrument, which had not as yet become a mortgage.

But it is urged on the part of the complainant that it was the duty of Howard, on making the purchase, to give actual notice of the fact to the mortgagees, so that they might not afterwards be led to incur further liabilities on the faith of the mortgage.

In England, where there is no general registry law by which the record of deeds and mortgages is made notice to all the world, and the state of the title cannot, therefore, be always ascertained in this way as with us, and where parties, therefore, can only rely upon actual notice, there may be good reason for requiring actual notice in such a case. But upon no principle which I have been able to comprehend do I think such actual notice should be required in a case like the present. Nor have I been able to see any just or substantial reason why the record of Howard's deed (which was long before this mortgage instrument took effect as an encumbrance, and therefore prior in fact and law) should not be deemed notice to the mortgagees in the same manner and to the same extent as if their mortgage had not been executed or recorded until the time when it became effectual as a mortgage by their indorsements. Within the very spirit and purpose of the registry law, it seems to me, the record of the deed must be held notice in the one case as well as in the other. The opposite view, it seems to me, rests upon the erroneous idea that the recording of a mortgage adds something to its validity as between the parties, and that, even as between them, an instrument may be made a mortgage by recording it which would not have that operation without the record. This, certainly, is not the effect of our registry laws. If Howard could not rely upon the record of his deed for giving notice to these mortgagees, as to future advances or indorsements, without which their mortgage instrument could never become effectual, even as between the parties, then it is difficult to see why he should be allowed to rely upon it as against any person whom he might know had contemplated purchasing or taking a mortgage upon the property, and whose efforts or conversations had gone so far as to render it probable to the mind of such person that his preliminary negotiations or conversations might, at some future period, have resulted in a purchase or a mortgage; though at the time of the record of Howard's deed they had not resulted in any binding contract whatever, and both parties were at liberty to disregard them without any breach of faith. As to all such persons, it has, I think, been generally conceded that the record of a deed is sufficient notice. In *Craig v. Tappan*, 2 Sand. Ch. 78, a case cited by complainant's counsel, it was held that notice that a mortgage was about to be made is not enough to bind a party with notice of the mortgage. And see *Cushing v. Hurd*, 4 Pick. 253 [16 Am. Dec. 335]; *Warden v. Adams*, 15 Mass. 232.

I have thus far endeavored to show that upon principles resulting from the nature of a mortgage, as recognized here, this mortgage should be considered, in fact and in legal effect, subsequent to the deed, and that the registry of the deed should therefore be considered notice to the mortgagees. The authorities upon this question are not so numerous as one would be led to expect; but the few which are to be found are conflicting. I shall first notice those which are claimed to be opposed to the conclusion at which I have arrived. The English authorities upon this question I consider of very little, if any, weight, for the reason already stated, and for the further reason that, for several purposes, a mortgage is there still held to be a conveyance of the estate upon condition, and the mortgagee as having the legal title,—a doctrine upon which the right of tacking (never recognized in this state) to some extent depends; the legal title coupled with an equity being held to prevail over an equity: 4 Kent's Com. 117; Coote on Mortgages, 410 et seq.; opinion of Lord Cranworth in *Hopkinson v. Ralt*, 7 Jur., N. S., 1209. The latter remark applies also with equal force to the decisions cited from Kentucky. *Nelson v. Boyce*, 7 J. J. Marsh. 401 [23 Am. Dec. 411], goes upon the express ground that the mortgage conveys the legal title, and that the mortgagee, therefore, is not bound to notice the record of a mortgage subsequently made by the mortgagor, who has only the equity of redemption. It cites *Kentucky Bank etc. v. Vance*, 4 Litt. 173, as supporting the doctrine of tacking upon this ground. *Nelson v. Boyce, supra*, also assigns, as another reason why the record should not be notice, a provision of their statute allowing sixty days in which to record a mortgage, and says an examination of the record by the first mortgagee might therefore be of no use.

Now, it is clear that neither of these reasons for refusing to the record the effect of notice exists here. Of the case of *Burdett v. Clay*, 8 B. Mon. 287 (besides the fact that the mortgagee there holds the legal estate), it may further be noticed that though the previously recorded mortgage was in part to secure future liabilities, yet all the liabilities were incurred before the subsequent mortgage. There are some few cases in this country, decided mainly, if not solely, upon the authority of *Gordon v. Graham*, 7 Vin. Abr. 52, S. C., 2 Eq. Cas. Abr. 598, which can have little influence here, not only for the reason above stated, but because the case itself is no longer law even in England. This case decided that a mortgagee hold-

ing a mortgage to secure money lent, and future advances (which he was not bound to make), was entitled to preference over a subsequent mortgagee, even for advances made after notice of the second mortgage. But so far as relates to advances made after such notice, this case was expressly overruled by the house of lords in *Hopkinson v. Ralt*, 7 Jur., N. S., 1209; S. C. 5 L. T., N. S., 90.

Most of the cases cited by complainant's counsel against the proposition I have endeavored to establish have no bearing upon the particular question we are now discussing. *Utica Bank v. Finch*, 3 Barb. Ch. 293 [49 Am. Dec. 175], only decides that when a mortgage is given to secure an existing debt the mortgagee does not lose his security by extending the time and taking a renewal note for the same debt. In *Craig v. Tappan*, 2 Sand. Ch. 78, the question of notice did not arise, and so far as the reasoning of the court has any bearing upon the present question, it is in favor of the position I have endeavored to establish. In *King v. McVickar*, 3 Id. 208, *Stuyvesant v. Hone*, 1 Id. 419, and *Stuyvesant v. Hall*, 2 Barb. Ch. 151, no question of future advances or liabilities was involved; but the question relating to the effect of the record was similar to that decided in this court in *James v. Brown*, 11 Mich. 25, and decided the same way,—a question so entirely foreign to that we are now discussing as to require no comment.

Frye v. Illinois Bank, 11 Ill. 381, only decides that a mortgage subsequently executed is entitled to preference over one previously executed for future advances, after notice of the second mortgage to the first mortgagee. The notice in this case happened to be an actual notice, but the question of the effect of the record, as notice, was not involved nor decided. *Rowan v. Sharp's Rifle Co.*, 29 Conn. 282, has no bearing upon this question. The title had never been in the debtor, but was conveyed by a third person to and held by the creditors, in security for future advances for the debtor, which the creditors had agreed to make. The decision stands well upon two grounds: 1. The title being in the creditors, and not in the debtor, the creditors were not bound to notice the record of a mortgage made by the debtor, who had no title; 2. That the advances were not voluntary, the creditors being bound to advance forty thousand dollars, and the balance being advanced to save their interest and to carry the contract into effect. Hence the creditors were allowed priority for all their advances, though part were made after notice of the mortgage.

In *Wilson v. Russell*, 13 Md. 495, the deed of trust, which was in the nature of a mortgage, recited that the mortgagees had agreed to loan the mortgagors their notes, from time to time, as might be desired, etc. The case seems to have been decided mainly on the authority of *Gordon v. Graham, supra*, the authority of which is recognized, though it was not needed in that case. It does not appear whether there was actual notice of the second mortgage, and no difference is intimated between actual notice and the record. In *Taylor v. Maris's Ex'rs*, 5 Rawle, 51, the question, so far as regarded the effect of the record, was similar to that in *James v. Brown*, 11 Mich. 25. The judgment was, in legal effect as well as in date, a prior encumbrance, and the mortgage, in legal effect as well as in date, subsequent to it. There were no future advances in question.

There are, however, two cases (and they are the only ones cited, or which I have met with) which are directly opposed to the conclusion at which I have arrived, and which go to the point that the record of Howard's deed would not be notice to Ladue and Eldred,—*McDaniels v. Colvin*, 16 Vt. 300 [42 Am. Dec. 512], and *Truscott v. King*, 6 Barb. 346; S. C. on appeal, 6 N. Y. 166. *McDaniels v. Colvin, supra*, rests upon the authority of English cases, among which is that of *Gordon v. Graham*, 2 Eq. Cas. Abr. 598, which are adopted by the court as authority. The case expressly holds that the record of the second mortgage could not be held notice, even as to subsequent advances, under the first mortgage. Judge Redfield (afterwards chief justice) dissented. See his remarks upon this question (sustaining the views I have adopted), 12 Am. Law Reg. 191. And in the extent and character of the actual notice to be given by the subsequent to the prior mortgagee, this case would not probably now be recognized as law in any court in this country. *Truscott v. King, supra*, was the case of a judgment to secure a sum due, as well as future advances which might be made, and a mortgage was subsequently made by the debtor. Advances were made by the judgment debtor after the mortgage was recorded. As decided in 6 Barbour, it was held that the judgment took precedence for all advances until actual notice of the mortgage, on the ground that the record is only notice to subsequent, and not to prior, encumbrancers. In the court of appeals (6 N. Y.), where the judgment was reversed on other grounds, Judge Jewett, who gives the leading opinion of the court, does not

allude to this point. It is only alluded to by Edmonds, J., who says: "It is well settled that a judgment for future advances is good, not only against the debtor, but also against subsequent encumbrancers, at least up to the time when a subsequent judgment or mortgage should intervene. But when such subsequent encumbrance may be said to intervene is not so well settled, whether at the time it is put upon record, or at the time the prior encumbrancer has actual notice of it. The supreme court, in deciding the case, held that it ought to be only from the time of actual notice, because the docketing of a judgment or recording of a mortgage was, under the statute, notice only to subsequent, and not to prior, encumbrancers. In this I am inclined to think the court was right."

Now, it seems to me the real question which lay at the basis of the inquiry in the above case, and to which that decided by the court was only incidental and secondary, was, Which in legal effect was the prior, and which the subsequent, encumbrance? and this depended solely upon the fact when, as regarded the advances in question, they respectively took effect. Did the judgment, in legal effect, become an encumbrance for such advances before they were made and before there was any agreement that they should be made? What were the relative rights of the parties to the judgment at the time the mortgage was recorded? Could the judgment be enforced as an encumbrance for these advances by reason of any rights or obligations existing between the parties at that time? If not, then, as to these advances, there was no encumbrance at the time the mortgage was recorded, and the encumbrance of the judgment was, in legal effect, subsequent to the mortgage. This, which seems to me to be the main question, is neither discussed nor alluded to either by the supreme court or the court of appeals. The court therefore, in simply saying that the record of the mortgage is notice only to subsequent encumbrancers, assume, as it seems to me, without an attempt to establish, the main point in controversy. There may, perhaps, be some difference in principle between a judgment given as security for future advances and a mortgage given for a like purpose. But if there is not, and if the decision in *Truscott v. King*, *supra*, is to be considered as equally applicable to a mortgage, then I cannot resist the conviction that it is in direct conflict with the principles which necessarily result from the uniform course of decision in that state,—holding a mortgage to be a mere security for and incident of the debt, incapable of a separate and independent existence.

Having examined the cases relied upon by the complainant's counsel as tending to controvert the conclusions at which I have arrived, I will now refer to those of an opposite tendency, some of which expressly hold the record to be notice of the intervening conveyance or encumbrance.

In *Collins v. Carlile*, 13 Ill. 254, there was a mortgage to secure future advances, and a contract subsequent in date and time of record for the sale of the land by the mortgagor, both recorded. It was held the mortgage was valid for those advances only which were made prior to the recording of the contract. The principle is not discussed, but it seems to be taken for granted that the record of the contract was notice as to advances afterwards made.

In *Kramer v. Farmers' and Mechanics' Bank*, 15 Ohio, 253, it was held that a mortgage to indemnify against indorsements to be made for the mortgagor is valid and constitutes a lien, which takes precedence of the lien of a judgment rendered after such indorsements have been made. But it is said the lien of a judgment would probably be preferred to the lien of the mortgage for advances made subsequent to the recovery of the judgment. The liability of the mortgagee had attached before the subsequent judgment, and therefore the point was not involved. But in the subsequent case of *Spader v. Lawler*, 17 Ohio, 371 [49 Am. Dec. 461], which was also the case of a mortgage to secure future advances, it was held that the mortgage must be postponed to a mortgage subsequently recorded, but before the future advances were made, thus directly holding the record notice as to advances thereafter made under the first recorded mortgage; in other words, treating the first as a subsequent mortgage in reference to advances made after the record of the second. It is true that one of the grounds upon which the decision seems to be placed is, that the record of the mortgage (for the advances) ought to give notice of the amount of the encumbrance.

The first case, so far as I have been able to discover, which fully meets and discusses the question upon principle, is that of *Terhoven v. Kerns*, 2 Pa. St. 96. It was the case of a judgment to secure future advances, which were optional; and it was held that such judgment, as to advances made after the rendition of a subsequent judgment, was not a lien as against the latter. The judgments are treated by the court as standing upon the same ground as mortgages, and the question is discussed generally. It is held that a mortgage to secure fu-

ture advances which are optional does not take effect between the parties as a mortgage or encumbrance until some advance has been made, — that, if not made until after another mortgage or encumbrance has been recorded, it is, in fact, as to such after advances, a subsequent and not a prior encumbrance; and that the record of the subsequently recorded mortgage is notice, as to such after advances, as much as if the mortgage first recorded had not been executed until after such advances were made. The doctrines of this case were fully as strongly reaffirmed in *Bank of Montgomery's Appeal*, 36 Pa. St. 170; see also *Parmentier v. Gillespie*, 9 Id. 86, and note *a*, as to distinction between cases when the mortgagee is bound to make the advances and when they are optional. The doctrine of these cases is pronounced reasonable by Sanford, J., delivering the opinion of the court in *Boswell v. Goodwin*, 31 Conn. 74, and he pointedly asks why such mortgage should not be treated "in all respects as if executed at the time when the advances are made." But one of the judges dissented as to this point, and the case was decided upon other grounds.

Judge Redfield, late chief justice of Vermont, ably discusses this question in a note to the case of *Boswell v. Goodwin*, 3 Am. Law Reg., N. S., 92, arriving substantially at the same conclusion as that at which I have arrived. And Mr. Washburn (in 1 Washburn on Real Property, 542) says it seems now to be the general rule.

The counsel for the complainant have strongly urged the inconvenience which must result, especially to banks and bankers (who are accustomed to take such mortgages), by requiring an examination of the record every time they are called upon to make such advances under such a mortgage. Like Judge Redfield (in the note above cited), I have not "been able to comprehend" this hardship. It is, at most, but the same inconvenience to which all other parties are compelled to submit when they lend money on the security of real estate, — the trouble of looking to the value of the security. But in truth, the inconvenience is very slight. Under any rule of decision they would be compelled to look to the record title when the mortgage is originally taken. At the next advance they have only to look back to this period, and for any future advance only back to the last; which would generally be but the work of a few minutes, and much less inconvenience than they have to submit to in their ordinary daily business in

making inquiries as to the responsibility, the signatures, and identity of the parties to commercial paper. But if there be any hardship, it is one which they can readily overcome, by agreeing to make the advances; in other words, by entering into some contract, for the performance of which, by the other party, the mortgage may operate as a security. They can hardly be heard to complain of it as a hardship that the courts refuse to give them the benefits of a contract which, from prudential or other considerations, they were unwilling to make, and did not make until after the rights of other parties have intervened. Courts can give effect only to the contracts the parties have made, and from the time they took effect.

The decree must be reversed, and the bill dismissed; and the appellants must recover their costs in both courts.

MARTIN, C. J., and COOLEY, J., concurred.

CAMPBELL, J., did not sit in this case.

MORTGAGE CONVEYS NO TITLE, AND CREATES MERELY LIEN AS SECURITY FOR DEBT. For cases taking this view of mortgages, see *Wüner's Appeal*, 84 Am. Dec. 505; *Dutton v. Warechauer*, 82 Id. 765, and cases cited in the note 775; *Timms v. Shannon*, 81 Id. 632. The principal case is cited to this point in *Hogsett v. Ellis*, 17 Mich. 363; *Phelps v. Sellick*, 8 Nat. Bank. Reg. 392; and also to the point that a mortgagee has no possessory right until foreclosure: *Newton v. Sly*, 15 Mich. 396.

MORTGAGE TO SECURE FUTURE ADVANCES THAT ARE OPTIONAL WITH MORTGAGEE becomes effectual as a lien when the advances are made, and will be postponed as to such advances as are made subsequent to the recording of a second mortgage, or of a conveyance by the mortgagor: See *Boswell v. Goodwin*, 81 Am. Dec. 169, and note 174; *Spader v. Lawler*, 49 Id. 461, and the cases cited in the note 463; but see *Commercial Bank v. Cunningham*, 35 Id. 322; *Manufacturers' etc. Bank v. Bank of Pennsylvania*, 42 Id. 240. The principal case is cited to the point that where there is no obligation on the part of the mortgagee to make advances or incur liabilities which the mortgage is to secure, but this is optional with him, if he make such advances or incur such liabilities with notice that the mortgaged property has been purchased or encumbered by another, the mortgage will not prevail against the subsequent purchaser or encumbrancer: *Brinkmeyer v. Browneller*, 55 Ind. 494; but where there is such an obligation on the part of the mortgagee, the rule is otherwise: *Brinkmeyer v. Helbing*, 57 Id. 450. Where a mortgage secures future liabilities, and the mortgaged property is attached, the mortgagee increases his demands at his peril, for the attachment is of the mortgagor's interest as it then stands, and he can have no power to diminish that interest afterwards to the creditor's detriment: *King v. Hubbell*, 42 Mich. 604, citing the principal case. So when a mortgage is given for an amount exceeding what is advanced, it is valid in the hands of the mortgagee, and those standing in no better light, only to the extent of the real advances: *Robinson v. Cromelien*, 15 Mich. 322, citing the principal case.

PEOPLE v. CROSSWELL.

[13 MICHIGAN, 427.]

RAPE. — Reluctance and resistance on the part of an adult woman are essential to the commission of this offense. Perhaps an exception to this rule exists when the woman shows by her words and conduct that the act was against her will, but finally ceases to resist because of insensibility produced by liquors administered to her by the accused.

RAPE. — **SEXUAL INTERCOURSE WITH DEMENTED OR INSANE WOMAN** who does not resist, and who apparently assents thereto, is not rape. If, however, a man, knowing a woman to be insane, takes advantage of that fact to carnally know her, when her mental powers are so impaired that she is unconscious of the nature of the act, and is not a willing participant therein, his offense is rape, though there is no distinct proof of her resistance.

PROSECUTION for rape. The accused, being convicted, moved for a new trial. The facts are stated in the opinion.

W. A. Balch, for plaintiff in error.

A. Williams, attorney-general, for the people.

By Court, COOLEY, J. The defendant was informed against in the circuit court for the county of Kalamazoo for rape, alleged to have been committed upon one Mrs. Crittenden. The information was in all respects in the usual form.

On the trial, evidence was adduced that four persons, walking in the road together through or past a piece of woods, saw Mrs. Crittenden and the defendant in the road together a few rods off; Mrs. Crittenden at the time lying upon her back with her clothes up to her waist, and the defendant on his knees before her; that he did not have hold of her, or seem to be exercising any control, nor she to be making any resistance; that sexual intercourse took place between them, after which, on some slight noise being made, the defendant got up and ran off, while Mrs. Crittenden came out towards the witnesses smiling, and followed them to a house in the neighborhood, where they were going to visit.

The prosecution then offered evidence to show that Mrs. Crittenden at the time was insane. The defendant objected to this as irrelevant, and also because, if insanity was a material fact, it should have been alleged in the information. The court overruled the objection, and the defendant excepted.

The evidence given to establish insanity showed that Mrs. Crittenden was forty-eight or forty-nine years of age, in appar-

ent good physical health, of good size and seeming strength; that she had been in the insane asylum at Kalamazoo the preceding year, but was at this time residing at home with her husband; that she worked some at home, but appeared to be uneasy, and said she ought to be doing something, but did not know what to do. The most pointed testimony was that of E. H. Van Dazen, the physician who was in charge of the insane asylum while Mrs. Crittenden was there, who testified that she was in a state of *dementia*,—not idiotic, but approaching towards it; that she had vague apprehensions of injury, and a predisposition to be with men,—a morbid rather than an active desire to have sexual intercourse; that that was one way in which her insanity manifested itself; that she was dismissed from the asylum not much improved, but under better control, and with more method in her conduct; that her general health was pretty good, and she was of good size, and apparently a strong woman. The witness did not think she had intelligent understanding at the time the crime was said to have been committed.

The court below, at the conclusion of the case, charged the jury that if the woman was so suffering from mental disease at the time as to have no intelligent will to oppose the act of the prisoner, and he knew of this her condition, then her failure to oppose him, or her seeming acquiescence, could not be urged against a conviction; and that if he made the attempt upon her person with the intent to have carnal intercourse, and she did not resist because she had no intelligent will to oppose, he was guilty of the offense charged. Under these instructions, the jury returned a verdict of guilty.

The exceptions present to us questions which we do not find distinctly passed upon in any adjudged case. The main question, and the only one we deem it necessary to discuss, is, whether the carnal knowledge of a woman *non compos mentis*, under the circumstances disclosed in the testimony above stated, can be punished as rape under the statutes of this state.

Rape is defined to be "the carnal knowledge of a woman by force and against her will": 1 East P. C. 434; 4 Bla. Com. 210. The statute providing for its punishment in this state (sec. 5730 of Compiled Laws) is in the following words: "If any person shall ravish and carnally know any female of the age of ten years or more, by force and against her will, or shall unlawfully and carnally know and abuse any female child under the age of ten years, he shall be punished," etc.

This statute does not change the nature of the offense as it stood at the common law, nor does it describe two distinct offenses, but the carnal knowledge of the female child under the age of ten years is held to be rape, on the ground that, from immaturity and want of understanding, the child must be deemed incapable of assenting, and the act presumed to be the result of force: *People v. McDonald*, 9 Mich. 150; *Commonwealth v. Sugland*, 4 Gray, 7. And it is insisted in this case that an insane woman, or one not mentally competent to exercise an intelligent will, is in the same position as respects this crime as a child under ten years of age, and that carnal knowledge of her person would constitute the offense, notwithstanding her acquiescence.

If the case before us can be regarded as rape, it is apparent that it must fall within the first clause of the section quoted, since the other is confined by its express terms to carnal knowledge of female children under the age of ten years, and cannot be extended by analogy to embrace other cases. But to warrant a conviction under the first clause of the section, the carnal knowledge must have been by force and against the will of the woman; and as there were facts before the jury, in this case, from which they might fairly infer that the woman, and not the man, was the soliciting party, and the charge of the judge must be construed in the light of the testimony, the real question to be determined is, whether that is by force and against the will, where the woman assented to and desired its commission, but without possessing, at the time, the mental capacity which would render her responsible for her own conduct.

The general rule requires, not only that there should be force, but that the utmost reluctance and resistance on the part of the woman should appear: *People v. Morrison*, 1 Park. Cr. 625; *Woodin v. People*, 1 Id. 464. The essence of the crime is said to be, not the fact of intercourse, but the injury and outrage to the modesty and feelings of the woman, by means of the carnal knowledge effected by force: *Pennsylvania v. Sullivan*, Addis. 143; 2 Bishop's Crim. L., sec. 944; 3 Greenl. Ev., sec. 210. As these circumstances are wanting in the present case, it becomes important to ascertain whether any other circumstances can be regarded as legal equivalents.

There are undoubtedly some cases where the law not only does not require actual force to be proved, but where force is presumed, and not suffered to be disproved. The case of car-

nal intercourse with a female child under ten years of age has already been alluded to, but the rule in that case is not an arbitrary one, but is based upon a well-understood fact in nature, that the child, at that tender age, is without desire for such intercourse, and the presumption that it is against her will is therefore in accordance with the general fact. Nature, indeed, does not definitely fix the period at which the child might become capable of understanding the character of the act, and assenting to it; and the statute has therefore named the age of ten years as the period when the conclusive presumption of opposing will shall cease. The rule in this case, we apprehend, depends less upon mental capacity than upon physical considerations, and the age named is not the age of consent, either at the common law or by the statute. It was, indeed, at one time supposed that if the female was over ten years of age, but under twelve, intercourse with her must necessarily be rape, because the capacity to consent was wanting; but the courts did not so hold, and statutes were passed making the act a misdemeanor where the female was between the age of ten and the age of consent, but where, not being against her will, it did not fall within the definition of rape: 1 Hale P. C. 631; 4 Bla. Com. 212; 1 Russ. Cr. 693.

In the case of *Regina v. Camplin*, 1 Den. C. C. 89, S. C., 1 Car. & K. 746, it appeared that the prisoner gave the woman liquor for the purpose of exciting her, but which had the effect to make her quite drunk; and while she was in a state of insensibility, he took advantage of it and violated her. The court held the act to be rape. The prosecutrix showed by her words and conduct, up to the latest moment at which she had sense or power to express her will, that it was against her will that intercourse should take place. It was no answer to the charge, therefore, that she had no opposing will at the moment when intercourse actually took place, since the prisoner had actually mastered it by means of the stupefying drug, which was the same, as was well remarked by one of the judges, as if it had been overcome by a blow.

In *Rex v. Charter*, 13 Shaw's J. P. 746, cited in 1 Bishop's Crim. L., sec. 343, note, and 2 Archb. Crim. Pl. & Pr. 167 (306), the prisoner had carnal knowledge of the person of a woman laboring under delirium, and who was insensible to the act. The act was held to be rape; but the decision can hardly be regarded as establishing an exception to the general doctrine as to this crime. If the woman was insensible, some

degree of physical force must actually have been employed by the prisoner; and no more resistance is required by the law, in any case, than the condition of the woman will permit her to make.

The facts in the case last cited made it open to the objection which appears to have been taken in *State v. Crow*, 10 West. Law J. 501; note to Whart. & St. Med. Juris., sec. 463, where the defendant was charged with the crime of rape committed upon an insane woman. That case is sometimes referred to as holding that all carnal intercourse with an insane woman is rape; but the point involved was a very different one, and the decision sanctions no such doctrine. It is not a little remarkable that, while it is insisted by the prosecution in this case that all intercourse with a woman in this condition must be rape, because she has no capacity to consent, it was there urged by the defense that no intercourse with her, even by force, could be rape, because she had no will to oppose.

Rape, it is said, must be against the will; and how can an act be against the will of a person who has no will? This argument made it necessary for the court to determine what is meant by the word "will," as used by the law in this connection, and we quote from the decision so much as has a bearing upon this question. "Is it true," said the court, "that an idiot or insane person has no will? What is the definition of these two words? Do they imply a loss of will or a mere unsoundness of mind? These words are thus defined by Webster: 'Idiot,—a natural fool; a fool from birth; a human being in form, but destitute of reason or the ordinary intellectual power of man.' 'Insane,—unsound in mind or intellect; mad; deranged in mind'; and one of the words used to define 'insanely,' is 'foolishly.' 'Fool' is defined to be 'one who is destitute of reason or the common power of understanding; an idiot.' In Chitty's Medical Jurisprudence, an idiot is defined to be 'a person who has been defective in intellectual powers from the instant of his birth, or at least before the mind had received the impression of any idea.' Again, Chitty says that 'idiocy consists in a defect or sterility of the intellectual power, while lunacy or madness consists in a perversion of the intellect.' All these definitions imply either a weakness or perversion of the mind or its powers, not their destruction. Hence, an idiot cannot be said to have no will, but a will weakened or impaired; a will acting, but not in conformity to those rules and motives and views which control the action of persons of

sound mind. Indeed, in an insane person the will is too often fearfully active, and entirely uncontrollable by reason or persuasion. There is here no lack of will, but simply a perversion of it. Nor is this the most conclusive answer to the argument. If there is no will, how are voluntary actions continued? Actions, like respiration, are instinctive, and independent of the will; but eating, and numerous other acts which necessarily imply the exercise of the will, are performed by idiots and insane persons, and their exercise demonstrates the existence of a will,—of a will that can assent to or dissent from what are clearly voluntary acts. I have therefore no hesitation in holding that both idiots and insane persons are possessed of a will, so that it may be legally and metaphysically said that a carnal knowledge may be had of their persons forcibly and against their will."

From the brief note of the Scotch case of McNamara, Arkley, 521, 524, in 2 Bishop's Crim. L., sec. 989, note, a similar defense would seem to have been made there. The woman, in that case, was an idiot; and the court told the jury that if they believed the defendant "had actually penetrated the girl, and that she had shown any physical resistance to however small an extent, the offense would be complete, in consequence of her inability to give a mental consent."

Both these cases, while not perhaps distinct authorities to that effect, clearly imply that the same circumstances must exist to constitute rape in the case of an idiot or insane woman as where the woman is of sound mind. The word "will," as employed in defining the crime of rape, is not construed as implying the faculty of mind by which an intelligent choice is made between objects, but rather as synonymous with "inclination" or "desire"; and in that sense it is used with propriety in reference to persons of unsound mind.

We are aware of no adjudged case that will justify us in construing the words "against her will" as equivalent in meaning with "without her intelligent assent," nor do we think sound reason will sanction it. But though the definition of the offense implies the existence of a will in the woman which has opposed the carnal knowledge, no violence is done to the law by holding, in any case where the woman, from absence of mental action, does not willingly acquiesce, that the physical force necessary to effectuate the purpose, however slight, is against her will. As was said by Alderson, B., in Camplin's case, above cited, a woman may be supposed

to have a general will not to be ravished; and the man is not to be excused because she was prevented or was unable to exercise it in the particular case. If, therefore, a man, knowing a woman to be insane, should take advantage of that fact to have knowledge of her person, when her mental powers were so impaired that she was unconscious of the nature of the act, or was not a willing participator, we should have no difficulty in holding the act to be rape, notwithstanding distinct proof of opposition might be wanting. All such cases stand upon reasons which clearly distinguish them from the case now before us, where the will was active, though perverted, and all idea of force or want of willingness is distinctly disproved.

There are cases in which it has been held that if the woman's consent is obtained by fraud, she at the time supposing the man to be her husband, the crime of rape is not committed: *Rex v. Jackson*, Russ. & R. C. C. 487; *Regina v. Saunders*, 8 Car. & P. 265; *Regina v. Williams*, 8 Id. 286; *Regina v. Clarke*, 29 Eng. L. & Eq. 542; *State v. Murphy*, 6 Ala. 765 [41 Am. Dec. 79]; *Wyatt v. State*, 2 Swan, 394. But there are some cases in this country to the contrary, and they seem to us to stand upon much the better reasons, and to be more in accordance with the general rules of criminal law: *People v. Metcalf*, 1 Whart. 378, and note 381; *State v. Shepard*, 7 Conn. 54. And in England, where a medical practitioner had knowledge of the person of a weak-minded patient, on pretense of medical treatment, the offense was held to be rape: *Regina v. Stanton*, 1 Car. & K. 415. The outrage upon the woman, and the injury to society, is just as great in these cases as if actual force had been employed; and we have been unable to satisfy ourselves that the act can be said to be any less against the will of the woman when her consent is obtained by fraud, than when it is extorted by threats or force.

Undoubtedly, fraud would be much more readily inferred in a case of mental derangement than where the woman's powers of mind were unimpaired; but in the present case, no circumstance of either fraud or force was required by the charge of the court to the completion of the offense, nor is it suggested that any such circumstance existed. The naked fact of intercourse, with knowledge of the mental condition, was held sufficient. As one who has knowledge of the facts which prove insanity must be supposed to know that insanity exists, it would follow that, in any case of doubt, a man's guilt or inno-

cence would depend upon the preponderance of testimony on the question of the woman's competency. As marriage with an insane person is void, it might become a serious question whether the ceremony could protect the too partial bridegroom from prosecution for rape, where he had relied upon manifestations which, to him, appeared the evidences of genius, but which experts should convince a jury were only the vagaries of a disordered imagination.

The conclusion at which we have arrived is, that rape, at the common law or under our statute, is not committed upon the person of a woman over ten years of age, where no circumstance of either force or fraud accompanies the carnal knowledge.

The circuit court must be advised that, in the opinion of this court, the conviction was erroneous, and that the verdict should be set aside, and a new trial granted.

CAMPBELL and CHRISTIANCY, JJ., concurred.

MARTIN, C. J., concurred in the result.

ESSENTIAL ELEMENTS OF CRIME OF RAPE are considered, and the cases in this series upon this subject referred to, in the note to *Smith v. State*, 80 Am. Dec. 361-375.

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ADVERSE POSSESSION.

1. **WHERE ONE IN POSSESSION OF LAND UNDER CONTRACT OF PURCHASE** executed by the husband of one of two women, co-tenants thereof, brings a bill to enjoin a purchaser from said two women, claiming under a deed executed by them after the death of said husband, from cutting timber on said land, in which he alleges that his contract was made by the husband of said co-tenant with the consent of his wife, and that the title was still outstanding, does not show such a right to the land as would bar the entry of the grantee under the above deed; nor in view of the averments of the bill can any presumption of a grant or of adverse possession be indulged. *Dean v. Brown*, 555.
2. **ADVERSE POSSESSION, WHAT CONSTITUTES.** — Possession to be adverse must be accompanied with a positive and exclusive claim of the entire title; where the title claimed admits the existence of a superior title, the possession will not be adverse to that title. *Id.*
3. **POSSESSION UNDER AGREEMENT TO PURCHASE — NOT ADVERSE.** — Where one contracts for land, and enters into possession under an agreement for a conveyance of the title on payment of the purchase-money, there can be no adverse holding, even if possible then, until the condition on which the conveyance depends has been performed. *Id.*
4. **OWNER OF LAND WHO HAS BEEN DISPOSSESSED MUST ASSERT HIS CLAIM** thereto by performing some act that will reinstate him in possession before he can regain what he has lost. A mere casual entry, or an entry by stealth under circumstances that go to show that he claims no right to enter, or an entry for other purposes than those connected with a right to enter, will not be sufficient to break the continuity of exclusive possession in the disseisor. It is therefore error for the court to charge that a person claiming a prescriptive right to a public landing "must have excluded the public, and every member of it"; an exclusion from the possession is all that is required. *Burrows v. Gallup*, 186.
5. **GRANTOR OF LAND TAKING ADVERSE POSSESSION SUBSEQUENT TO HIS DEED**, and holding continuous adverse possession for five years, may set

up the statute of limitations as a defense in an action of ejectment brought against him by his grantee. *Franklin v. Dorland*, 111.

6. IN PETITION FOR PARTITION, SOLE SEISIN IN RESPONDENT MAY BE ESTABLISHED by a possession commenced twenty years before the trial, although less than twenty years before the commencement of the suit. *Brackett v. Persons Unknown*, 548.
7. OPEN, NOTORIOUS, EXCLUSIVE, AND ADVERSE POSSESSION of upland adjacent to plats, for twenty years, under a duly recorded deed, gives title to all the flats fronting such upland, and described in the deed. *Id.*

ADULTERY.

See HOMESTEADS, 8.

AGENCY.

1. UPON SALE OF PERSONAL PROPERTY BY PAROL, TITLE MAY VEST in an undisclosed principal for whom the apparent purchaser is negotiating as agent, and the principal, though unknown to the seller, may vindicate by suit in his own name his rights in the property. *Tainter v. Lombard*, 552.
2. IN LOUISIANA FIDUCIARY AGENTS CANNOT TRANSFER negotiable assets without an order of court, and such rule will prevail in the absence of any *lex loci contractus*. *Burbank v. Payne*, 513.

See CORPORATIONS, 8, 9; MASTER AND SERVANT, 1.

ARBITRATION AND AWARD.

1. UPON SUBMISSION OF DISPUTE TO TWO PERSONS WITH AUTHORITY IN CASE OF DISAGREEMENT to choose a third person, the award of whom or a majority of whom, in case a third person shall be chosen, shall be final; if the two arbitrators, being unable to agree as to the amount of damages, appoint a third person "as umpire to act with us in the hearing and final decision thereof in the manner contemplated in said agreement," and the person so chosen, after a new hearing before all three of them, makes to the parties a written statement of his decision, which shows that he arrived at it without consultation with the other arbitrators, and that he did not consider it to be his duty to fix independently the amount of damages to be awarded, but only to determine which of the others had fixed the sum nearest in his judgment to justice and equity, and he accordingly unites with the arbitrator who fixed the highest sum, and those two make an award of damages, by a separate paper, which does not show that the other arbitrator acted at all in the case, such award is void, although such third person declares his own opinion that the sum awarded is too small. *Haven v. Winnisimmet Co.*, 723.
2. DISTINCTION BETWEEN SUBMISSION TO ARBITRATORS WITH POWER TO REFER TO UMPIRE, and submission to arbitrators with authority to choose another to act with them, stated. *Id.*

ARREST.

1. NAME OR SOME DESCRIPTION OF PARTY TO BE ARRESTED ON WARRANT MUST BE EXPRESSED THEREIN. Warrant granted with the name in blank, and without other designation of the person to be arrested, is void. *Commonwealth v. Crotty*, 669.

2. WHERE PARTY WHOSE NAME IS UNKNOWN IS TO BE ARRESTED, WARRANT MUST CONTAIN the best description possible of the person to be arrested; and it must be sufficient to indicate clearly on whom it is to be served, by stating his occupation, his personal appearance and peculiarities, the place of his residence, or other circumstances by which he can be identified. *Id.*
3. OFFICER SEEKING TO SERVE VOID WARRANT BECOMES TRESPASSER; so with any other person. *Id.*
4. WARRANT TO ARREST "JOHN DOE OR RICHARD ROE, WHOSE OTHER OR TRUE NAME IS UNKNOWN," without any further description or means of identification of the person to be arrested, is void. *Id.*
5. PERSON SOUGHT TO BE ARRESTED UPON VOID WARRANT MAY LAWFULLY RESIST; and third persons may lawfully aid him in such resistance, using no more force than is necessary to prevent the arrest without being guilty of a riot. *Id.*

ASSIGNMENTS.

See FRAUDULENT ASSIGNMENTS; MORTGAGES, 1, 7, 8; NEGOTIABLE INSTRUMENTS, 18, 19.

ATTACHMENT.

1. ATTACHMENT, REGULAR UPON ITS FACE, IS NOT VOID because the complaint does not set up a cause of action which would warrant the issuance of an attachment. *McComb v. Reed*, 115.
2. SHERIFF RECEIVING ATTACHMENT REGULAR ON ITS FACE cannot pay over the money obtained by him from the sale of property levied on by virtue of the writ to a junior attaching creditor, because the complaint in the action on which the first attachment was issued did not set forth a cause of action upon which an attachment could issue. *Id.*
3. IT IS DUTY OF SHERIFF RECEIVING MONEY ON EXECUTION SALE of property, levied on by virtue of attachments, to apply the money in the order of the attachments. The sheriff has no right to go back of the process and raise the question as to the validity of the attachments. *Id.*
4. WHETHER JUNIOR ATTACHING CREDITOR CAN SUCCESSFULLY ATTACK VALIDITY OF PRIOR ATTACHMENT on the same property, on the ground that the complaint did not contain a cause of action upon a contract, express or implied, for the direct payment of money, *quære*. *Id.*
5. GARNISHEE IS NOT ESTOPPED FROM DENYING INDEBTEDNESS TO DEFENDANT, by reason of the fact that before the suing out of the writ, he, the garnishee, had admitted to plaintiff that he was indebted to the attachment defendant, and that, if garnished, he would pay the money to the plaintiff. *Lewis v. Prenatt*, 321.
6. ATTACHMENT. — FUNDS IN HANDS OF TRUSTEE IN EQUITY are not, as a general rule, liable to attachment and condemnation until the share of the debtor has been ascertained by a statement of the trustee's trust and the settlement of his final account. *Groome v. Lewis*, 563.
7. RULE THAT ATTACHMENT WILL NOT LIE TO AFFECT FUNDS IN HANDS OF TRUSTEE, before the settlement of his accounts, rests altogether on jurisdictional considerations sufficient for the defense of a trustee as garnishee, as well as for the protection of the fund in his hands; but it is evident that these are purely matters of defense, of which the trustee should avail himself by motion, pleadings, or proof at some stage of the attachment proceedings, before the final judgment. The trustee is not required to

plead these facts specifically, but they should be disclosed to the court by some party to the proceeding before the matter is concluded by a judgment. *Id.*

8. **WHERE FUNDS IN HANDS OF TRUSTEE HAVE BEEN ATTACHED BEFORE SETTLEMENT OF HIS ACCOUNTS**, and the debtor's share ascertained, and such proceedings allowed to ripen into a judgment of condemnation, if the time within which errors can be assigned and corrected has passed, the judgment will be held final and conclusive of the rights established by it; and the fact that the garnishee had a good defense, or that he was clothed with a privilege protecting his fund from attachment, cannot now be inquired into. *Id.*
9. **NOT INTENDED FOR PROTECTION OF DEBTORS. — RULE THAT FUNDS IN HANDS OF TRUSTEE** cannot be attached until his accounts have been settled, and the debtor's share ascertained, is not intended as a device for the benefit of debtors, nor to protect their interest in trust funds from the appropriate remedies of their creditors, and is only applied where the existing facts and circumstances justify it, and will never be applied after there has been a final account and an order to the trustee to pay accordingly. *Id.*
10. **ATTACHMENT AGAINST FUNDS IN CHARGE OF TRUSTEE** may be issued and laid in his hands before the settlement of his accounts and the ascertainment of the share of the debtor, but it is not effective so as to subject the fund to condemnation until after the settlement of such account. *Id.*
11. **ATTACHMENT LAID IN HANDS OF TRUSTEE BEFORE FINAL ACCOUNT WILL BE GOOD**, if at any time before trial or judgment the share of the fund in hand belonging to the debtor is ascertained by a final account. *Id.*
12. **PROCESS OF ATTACHMENT OR GARNISHMENT, WHEN PURSUING CREDITS, UNLIKE ORDINARY SUITS**, does not necessarily relate back to the service of the writ, but may stand on the state of facts appearing at the time. *Id.*
13. **JUDGMENT ENTERED ON GARNISHMENT OF FUNDS IN HANDS OF TRUSTEE**, before his accounts have been settled, will be final and effective on the fund afterwards ascertained, if before that time no motion or other proceeding has been taken to correct that irregularity in the entry of the judgment. The ascertainment of the specific fund upon which the judgment takes effect cures the irregularity of entering it before the final account. *Id.*

See SHERIFFS.

ATTORNEY AND CLIENT.

1. **RIGHT OF ATTORNEY OF RECORD TO CONTROL AND MANAGE ACTION** cannot be questioned by the opposite party while he remains such attorney. *Board of Commissioners v. Younger*, 164.
2. **PARTY TO ACTION MAY APPEAR IN HIS OWN PROPER PERSON** or by attorney, but he cannot do both. If he appears by attorney, he must be heard through him, and cannot himself assume control of the case. *Id.*
3. **COURT SHOULD NOT DISMISS ACTION WITHOUT CONSENT OF ATTORNEY OF RECORD**, although the plaintiff, who has appeared by attorney, stipulates in writing that it be dismissed. *Id.*

BANKS AND BANKING.

1. **DEPOSIT IS NOT REAL DEPOSIT**, but a loan for the use of the banker, when the deposit is an irregular one, and in the absence of any special agree-

ment between the banker and depositor; as, when an account is kept; where money is deposited in bank to be drawn out, not in the identical fund deposited; where money deposited is mingled with the cash assets of the bank, and used indifferently therewith. *Schmidt v. Barker*, 527.

2. **IRREGULAR DEPOSIT OF MONEY IN BANK**, in the absence of any special agreement between the banker and depositor, is merely a loan for the use of the banker. Such deposit transfers the property to the loanee, and the relation between the bank and its customers is simply one of debtor and creditor. *Id.*
3. **DUE DILIGENCE — PRESENTMENT OF CERTIFICATE OF DEPOSIT, PAYABLE ON DEMAND.** — Defendant sent plaintiff a certificate of deposit, payable on demand, in payment of a debt. Plaintiff received and acknowledged the receipt thereof, and used and negotiated the certificate for fifteen days, when the bank issuing the certificate failed, and it was presented and protested. Mail communication between plaintiff and the bank occupied but two days. *Held*, that plaintiff had not used due diligence, and could not recover from defendant. *Bower v. Hoffman*, 569.
4. **PAYMENT — SANCTION OF DEPOSIT IN BANK.** — Where defendant deposits in a bank the amount of his debt to plaintiff, and sends him the bank's certificate of deposit, which plaintiff accepts and acknowledges receipt of, and uses for his own purposes, he sanctions the deposit as a payment to himself, and makes the bank his own agent to hold the sum subject to his order. *Id.*

BONDS.

1. **INTEREST IS RECOVERABLE IN ACTION ON BOND** given in the amount actually due, and not in a penalty. *Fraser v. Little*, 741.
2. **INTEREST IS NOT RECOVERABLE IN ACTION ON BOND GIVEN IN PENALTY.** *Id.*

See CORPORATIONS; GUARDIAN AND WARD; RAILROADS, 10-13; REPLEVIN, 5; WRITS, 2.

BOUNDARIES.

1. **IN FIXING BOUNDARIES, MONUMENTS MENTIONED IN DEED GOVERN COURSES AND DISTANCES.** *Franklin v. Dorland*, 111.
2. **DESCRIPTION IN DEED, "THENCE NORTHEASTERLY AS FORE RIVER RUNS,"** includes the flats to the middle of said river. *Brackett v. Persons Unknown*, 548.
3. **ACTION FOR DIMINUTION OF PRICE FOR DEFICIENCY** will not lie where land fronting on a bayou is sold by described metes and bounds, except the rear boundary, which is not defined, as containing a certain number of arpents. In such case the sale is one *per aversionem*, the depth of the land is presumed to be forty arpents, and the vendee takes all the land within the boundaries mentioned. *Davis v. Millaudon*, 517.

See PUBLIC LANDS, 8.

CAPTURE.

See MILITARY LAW.

COMMON CARRIER.

1. **COMMON CARRIERS ARE BOUND TO CARRY ARTICLES WITHIN SCOPE OF THEIR BUSINESS**, without any other contract than such as the law would imply. *Adams Express Co. v. Nock*, 510.

2. COMMON CARRIER IS NOT BOUND TO RECEIVE MONEY FOR TRANSPORTATION unless it is properly secured and addressed. *Fitzgerald v. Adams Express Co.*, 341.
3. REFUSAL OF COMMON CARRIER TO COUNT MONEY TAKEN FOR TRANSPORTATION, at the request of the consignor, will not create any presumption against him as to the amount contained in the package. *Id.*
4. REBUTTAL IN COMMON CARRIER'S RECEIPT, GIVEN FOR PACKAGE OF MONEY in a sealed envelope, that it is "said to contain" a given amount, is not *prima facie* evidence that the package did in fact contain the amount named. *Id.*
5. GOODS PLACED FOR SHIPMENT IN CAR OF RAILROAD COMPANY STANDING ON SIDE-TRACK, under exclusive control of the company, with the assent of the company, pass into the possession of the company, whether they be placed in the car by its own employees or by other persons. *Illinois Central R. R. Co. v. Smyser*, 301.
6. MERE SIGNING OF BILL OF LADING DOES NOT TRANSFER POSSESSION OF FREIGHT to a common carrier, but is merely evidence that he has received the possession, and this fact may be shown by any other legitimate evidence. *Id.*
7. LIABILITY OF COMMON CARRIER IS FIXED BY ACCEPTING PROPERTY to be carried, and this acceptance is complete when the property comes into his possession with his assent. *Id.*
8. RAILROAD COMPANY MAY, BY SPECIAL CONTRACT, LIMIT ITS COMMON-LAW LIABILITY for loss for injury to property placed in its possession for transportation, being still liable, however, for gross negligence or willful misfeasance. But it cannot restrict its liability by merely proving a usage on its part in giving bills of lading to notify shippers that the company would not be liable for certain kinds of losses. *Id.*
9. LIABILITY OF COMMON CARRIERS IS PECULIARLY STRINGENT, and they will not be permitted to limit that liability by special contracts, unless they are fairly made, and are fully understood by the other party, and are clearly proved. *Adams Express Co. v. Nock*, 510.
10. IN ACTION AGAINST COMMON CARRIER for the loss of a horse alleged to have been caused by the bursting of the boilers of a steamer by reason of the negligence of the carrier in racing at the time of the loss, evidence of the good condition of the boilers at such time is not admissible either on the question of liability or of damages. *Agnew v. Steamer Contra Costa*, 87.
11. COMMON CARRIER IS SUBJECTED TO ORDINARY RESPONSIBILITIES connected with his vocation, when the cause of damage for which recompense is sought is unconnected with the subject-matter of the damage. *Id.*
12. COMMON CARRIER OF LIVE-STOCK IS INSURER against all injury not resulting from the act of God, or the public enemies, or from the conduct of the animal being transported. *Id.*
13. IN ACTION AGAINST COMMON CARRIER for the loss of a horse, alleged to have been caused by the explosion of the boilers of a steamer, while negligently engaged in the act of racing, evidence is inadmissible to show that the boilers were good and sufficient, and that the officers and crew so conducted themselves that the explosion occurred by inevitable accident or unknown causes while the steamer was so engaged. *Id.*
14. PRESUMPTION IS AGAINST CARRIER in every case, except when it is made to appear that the injury complained of could not have happened by the intervention of human means. *Id.*

15. **COMMON CARRIER—LOSS OF BAGGAGE ON ONE OF TWO CONNECTING LINES—EVIDENCE OF DELIVERY TO SECOND.**—In going from one city to another, plaintiff traveled part of the way by steamboat and the remainder by railroad. He delivered his trunks to the steamboat company, received a check therefor, which he presented at the end of the railroad, where the trunks could not be found. In an action against the steamboat company for the value of the trunks, evidence of a clerk of the latter company that if the trunks were not delivered to the railroad company they would be brought back to the steamboat company's office, and that he knew of no such return during the month when the trunks were lost, is not sufficient to show a delivery to the railroad company exempting the steamboat company from liability. *Baltimore Steam Packet Co. v. Smith*, 575.
16. **FATHER MAY MAINTAIN ACTION AGAINST COMMON CARRIER FOR LOSS OF TRUNK** containing his daughter's clothes. As he is bound to provide for her, the loss is not so much hers as it is his. *Id.*
17. **FATHER WHO TRANSPORTS BAGGAGE OF DAUGHTER AND RECEIVES CHECKS THEREFOR MAY MAINTAIN** action against the common carrier for its loss, upon the contract, independent of his right as father. The contract for the transportation was made with him, and as holder of the checks, which take the place of a bill of lading, he may sue as consignee. *Id.*
18. **ACTION MAY BE MAINTAINED AGAINST EXPRESS COMPANY FOR LOSS OF PACKAGE OF MONEY**, although the amount of the loss has already been paid by a third person. The action may still be maintained for the use of such third person. *American Express Co. v. Haggard*, 257.
19. **DELIVERY OF PACKAGE BY EXPRESS COMPANY MUST BE ACTUAL AND BONA FIDE**, and not merely formal; and if an agent of the company abstracts the package while in the act of delivering it, the company will be liable, even though a receipt be signed, and the form of delivery gone through, by the agent's laying the package for a moment out of his hands. *Id.*
20. **COMMON CARRIERS BY WAGONS ARE REQUIRED TO DELIVER GOODS TO CONSIGNEE** at his house or place of business, and their liability as such continues until such delivery; but this rule does not apply to common carriers by vessels on the seas, lakes, or navigable rivers, or by railroads. *Bansemmer v. Toledo etc. R'y Co.*, 367.
21. **IN ACTION AGAINST STREET-RAILROAD COMPANY TO RECOVER DAMAGES** for the loss of a box of merchandise delivered to it to be carried for hire on the front platform of one of its cars, evidence that other persons had paid money to its conductors, with the knowledge of its superintendent, for the carriage of merchandise, is admissible to show the defendant to be a common carrier of goods. *Levi v. Lynn etc. R. R. Co.*, 713.
22. **STREET-RAILWAY COMPANY, IF PROVED TO BE COMMON CARRIER OF GOODS**, is liable as such for loss of a box of merchandise delivered to it to be carried for hire on the front platform of one of its cars. *Id.*
23. **CONDUCTOR OF STREET-RAILWAY CAR MAY EXCLUDE OR EXPEL THEREFROM** person whose condition, by reason of intoxication or otherwise, is such that it is reasonably certain that by act or speech he will become offensive or annoying to other passengers therein, although he has not committed any act of offense or annoyance. *Vinton v. Middlesex R. R. Co.*, 714.
24. **CARRIERS OF PASSENGERS ARE BOUND TO EXERCISE** towards such passengers the utmost care and diligence which human foresight can use. *State v. Baltimore etc. R. R. Co.*, 600.

25. **WHERE PARTY INJURED BY RAILROAD COMPANY** is not a passenger, the carrier is not required to exercise that degree of vigilance required of parties bearing a relation of trust and confidence or bailment towards each other. In such case the carrier is only required to use such care and diligence as would be exercised by skillful, prudent, and discreet persons having the control and management of such business, regarding their duty to the interests of all concerned. *Id.*
26. **WHERE PARTY INJURED BY RAILROAD COMPANY** is not a passenger, he is not entitled to recover if his negligence directly contributed to such injury, or if the accident could have been avoided by such care as might under all the circumstances have been reasonably expected to be exercised by one of his age and intelligence. This is true although the injury could have been prevented by the exercise of the utmost care and diligence on the part of the carrier. *Id.*

See DAMAGES, 5; FERRIES; RAILROADS.

CONFLICT OF LAWS.

See CONTRACTS, 1-5.

CONSTITUTIONAL LAW.

1. **DUE PROCESS OF LAW.** — The rights, liberties, or privileges of citizens cannot be taken away or abridged by act of the legislature, or in any way except by due process of law, that is, by means of law in its regular course of administration through courts of justice. *Rison v. Farr*, 52.
2. **LEGISLATION IS EXERCISE OF SOVEREIGN POWER**, and the legislature is supreme and uncontrollable, except in the particulars in which its power is restricted by the constitution. *Id.*
3. **CONSTITUTION IS SUPREME LAW OF LAND, IS OF BINDING FORCE AND OBLIGATION UPON ALL** departments of the government, fixes their powers, and limits the bounds within which they must act. It is fixed, permanent, uncontrollable, and transcendent in its nature and operation, and can be changed or revoked only by the power that made it, — the people. *Id.*
4. **ACT OF LEGISLATURE MUST NOT INFRINGE** upon either the constitution of the United States or upon that of the state, and if it does so it is absolutely void. *Id.*
5. **JUDICIAL DEPARTMENT IS PROPER POWER TO DECLARE CONSTITUTIONALITY OF LAW**, and every act of the legislature contrary to the true intent and meaning of the constitution will be declared null and void. *Id.*
6. **WHERE CONSTITUTION PROVIDES QUALIFICATIONS OF ELECTORS, ADDITIONAL ONES CANNOT BE REQUIRED** by act of legislature, and no person possessing the constitutional qualifications can be deprived of the exercise of the elective franchise by mere legislative enactment while the constitution remains unaltered. *Id.*
7. **WHERE CONSTITUTION PROVIDES QUALIFICATIONS OF ELECTORS**, an act of the legislature requiring the voter to take an oath to support the constitution of the United States and of the state does not restrict the right to vote as conferred by the constitution, nor add to the qualifications therein required, and is not unconstitutional. *Id.*
8. **WHERE CONSTITUTION PROVIDES QUALIFICATION OF VOTERS**, an act of the legislature requiring one who seeks to vote to first take oath that he has

not borne arms against the United States or the state, or aided the so-called confederate authorities, since a certain date, is unconstitutional, as such act is equivalent to a provision that no one who has so borne arms shall vote, and so adds additional qualifications; and again, such provision is punitive, and by such oath the person is found guilty and punished by being denied the right to vote, without due process of law. *Id.*

9. ACT OF STATE LEGISLATURE PROVIDING FOR TRIAL OF OFFENSES UPON INFORMATION is not repugnant to the provision of the United States constitution that "no person shall be held to answer for a capital or other infamous crime unless on presentment or indictment of a grand jury," etc., as this has application to proceedings in the United States courts alone. *State v. Barnett*, 471.
10. STATUTE MAKING IT CRIMINAL OFFENSE TO SELL MILK WHICH IS ADULTERATED, though with pure water only, is constitutional. *Commonwealth v. Walle*, 711.
11. REQUIREMENT OF CONSTITUTION THAT ACTS OF LEGISLATURE BE IN ARTICLES AND SECTIONS, IN SAME MANNER AS CODE is arranged, is directory in form, and looks more to convenience in adopting the law to codification than to its operative effect. *Hardesty v. Taft*, 584.

See HOMESTEADS, 1-5; STATUTES; WEIGHTS AND MEASURES, 1.

CONTEMPT.

1. JUDGMENT FOR CONTEMPT IS VALID WITHOUT ANY RECITAL of the facts which constitute the contempt. It is proper for the court to so state the facts, as if as stated they do not amount to contempt, the prisoner may be discharged, but their statement is not necessary to the validity of the judgment. *Easton v. State*, 49.
2. APPEAL DOES NOT LIE FROM JUDGMENT OF COURT IMPOSING FINE FOR CONTEMPT. *Id.*

CONTRACTS.

1. LAW OF PLACE WHERE CONTRACT IS MADE GOVERNS PERFORMANCE of its terms and conditions as a general rule; but when it is to be performed at a different place and under a different jurisdiction from that where it was entered into, then the law of the place of performance must govern. *Lewis v. Headley*, 227.
2. PARTIES TO AGREEMENT ARE PRESUMED TO KNOW LAW OF PLACE where performance is to be made, and to contract with a view to that law unless it is otherwise expressed in the contract, and this presumption is legal and irrebutable. *Id.*
3. IT IS LEGAL PRESUMPTION THAT CONTRACT IS TO BE PERFORMED where it is made, unless it specifies a different place of performance. *Id.*
4. NOTES AND CERTIFICATES OF DEPOSIT ARE GOVERNED BY LAW OF STATE where they are payable though given in pursuance of an arrangement made in another state. *Id.*
5. PARTY TO CONTRACT WILL NOT BE HEARD TO SAY THAT HE WAS IGNORANT of the law of the state where the contract is to be performed, and it is error for the court to instruct in an action on such contract that the party should be shown to have knowledge of that law. *Id.*
6. COURT WILL NOT LEND ITS AID TO SETTLE DISPUTES relative to invalid contracts. It will notice their illegality *ex officio*, and allow it without any plea at any stage of the proceedings. *Schmidt v. Barker*, 527.

7. **PARTIES CANNOT BE HEARD, WHO ASK RELIEF** from violation of law. They are left where their conduct has placed them, and in *para causae melior est conditio possidentis*. *Id.*
 8. **CONTRACT IS VOID WHICH DEPENDS UPON CONDITION OF THING impossible, contra bonos mores, or prohibited by law.** *Id.*
 9. **PARTY WHO BINDS HIMSELF UNWILLINGLY** and, under restraint is not deemed, in the eye of the law, a participant in an illicit covenant. *Id.*
 10. **PLAINTIFF MUST NOT APPEAR, FROM HIS OWN SHOWING,** to have voluntarily infringed the law of the land; if he does, he cannot avail himself of the aid of a court to enforce a contract made in opposition to law. *Id.*
 11. **CONTRACT OTHERWISE VALID, BUT VOID ONLY BECAUSE MADE ON SUNDAY,** constitutes an exception to the general rule that void contracts are not susceptible of ratification. *Love v. Wells*, 375.
 12. **CONTRACT AGREEING TO PAY SPECIFIC SUM IN GOLD COIN, or upon failure thereof to pay such further sum as may be equal to the difference in value between gold coin and legal-tender notes,** belongs to the class of contracts provided for in the so-called specific-contract act of California, and may be enforced according to its meaning; and the meaning of such contract is that the maker will pay in gold coin, or if he does not do so, in legal-tender notes at their gold value, and a judgment may be rendered on such contract payable in gold coin alone. *Lane v. Gluckauf*, 121.
 13. **CALIFORNIA SPECIFIC-CONTRACT ACT WAS NOT INTENDED TO LEGALIZE** CONTRACTS which without it were illegal, but to provide a remedy for enforcing certain contracts, if held to be legal. *Id.*
- See CUSTOMS; JUDGMENTS, 11; SPECIFIC PERFORMANCE; STATUTE OF FRAUDS; WEIGHTS AND MEASURES.**

CORPORATIONS.

1. **QUESTION WHETHER DEFENDANT IS CORPORATION OR NOT SHOULD BE PRESENTED BY PLEA IN ABATEMENT,** and not by motion to quash the return of summons, it being raised upon matter *dehors* the record. *American Express Co. v. Haggard*, 257.
2. **PLEA IN ABATEMENT IS BAD, BECAUSE IT DOES NOT GIVE PLAINTIFF BETTER WRIT,** where the "American Express Company" is sued as a corporation, and a plea in abatement is filed in the names of several persons "and others," admitting that they "together with others" were doing business under the name of the "American Express Company," but denying that the company was a corporation. The plea should have set forth who were the "others," so that the plaintiff might know against whom to bring his suit, if the plea should prove to be true. *Id.*
3. **OFFICERS OF CORPORATION HAVE NO POWER** to authorize the execution of a note as surety for another in respect to a matter having no relation to the corporate business; and a party receiving such note with notice cannot recover on it. *Hall v. Auburn Turnpike Co.*, 75.
4. **OFFICERS OF CORPORATION HAVE NO POWER** to make or ratify a note given by one of their number to secure his individual indebtedness. *Id.*
5. **WHERE IN ACTION BY PAYEE ON NOTE,** given by one of the directors of a corporation for his individual indebtedness, and ratified by all of the other directors in the name of the corporation, the answer denies that the making and delivery of the note is the act of the corporation; evidence establishing such fact is admissible. *Id.*

6. CORPORATION IS LIABLE FOR WRONGFUL ACTS OF ITS SERVANTS, done in its employment, and may even be indicted for acts of misfeasance or non-feasance. *Donaldson v. Mississippi etc. R. R. Co.*, 391.
7. CORPORATION IS LIABLE IN CIVIL ACTION FOR WRONGFUL ACTS OF ITS SERVANTS, DONE IN ITS EMPLOYMENT, CAUSING DEATH OF PERSON, under section 4111 of the Iowa Revision of 1860, providing that "where a wrongful act produces death, the perpetrator is civilly liable for the injury." *Id.*
8. AGENTS, OFFICERS, OR EVEN CITY COUNCIL OF MUNICIPAL CORPORATION cannot bind the corporation when they transcend their lawful powers; and a city warrant is subject to this rule, notwithstanding it is negotiable in form. *Clark v. City of Des Moines*, 423.
9. EVERY ONE IS CHARGED WITH KNOWLEDGE OF NATURE OF DUTIES AND EXTENT OF POWERS of the officers and legislative body of a municipal corporation, since they are merely the public agents of the corporators, and their duties and powers are prescribed by statute. *Id.*
10. MUNICIPAL CORPORATION MAY SET UP PLEA OF ULTRA VIRES or its own want of power under its charter or constituent statute to enter into a given contract or to do a given act in violation or excess of its corporate authority. *Id.*
11. NEGOTIABILITY WILL NOT VALIDATE OBLIGATIONS WHICH ARE NOT BINDING because of a want of power to make or issue them. *Id.*
12. CITY WARRANTS ARE IN LEGAL EFFECT PROMISSORY NOTES, NOT BILLS OF EXCHANGE. *Id.*
13. MUNICIPAL CORPORATIONS HAVE SUCH POWERS ONLY AS ARE EXPRESSLY GRANTED, and such incidental ones as are necessary to make those powers available and essential to effectuate the purposes of the corporation; and their powers are strictly construed. *Id.*
14. OFFICERS OF CITY HAVE NO POWER TO ISSUE NEGOTIABLE PAPER for claims and demands against the city when they have no express authority, and the existence of such a power is not necessary, as an incident, to those granted, or to carry out the purposes and objects of the corporation. *Id.*
15. BONA FIDE HOLDER OF WARRANTS DRAWN BY OFFICERS OF CITY UPON TREASURY, in taking the warrants, is bound at his peril to ascertain the nature and extent of the power of the officers and the city. *Id.*
16. WANT OF CORPORATE POWER OR WANT OF AUTHORITY IN MUNICIPAL OFFICERS cannot be supplied by their unauthorized acts or representations. *Id.*
17. CITY WARRANTS ISSUED IN SATISFACTION OF JUDGMENT AGAINST CITY at the rate of one dollar in warrants for every seventy-five cents due on the judgment are usurious. *Id.*
18. IT IS DOUBTFUL WHETHER MUNICIPAL CORPORATION IS BOUND BY ACTION OF ITS COUNCIL in agreeing to pay a sum clearly, distinctly, and ascertainably greater than is legally due. *Id.*
19. WHERE, UNDER CHARTER OF CITY, CARE OF ROADS AND STREETS IS CORPORATE MATTER, and for road debts city is unconditionally liable as for other debts, this liability cannot be controlled or varied by the form in which the warrants are drawn or worded by the municipal officers; and hence, though the warrants are drawn payable out of a particular road fund, the liability of the city is still general, and not conditioned upon the existence of such funds in the treasury. *Id.*
20. MUNICIPAL CORPORATION CANNOT ERECT TOLL-BRIDGE AND LEVY AND COLLECT TOLLS unless authorized by the law of the state. *Id.*

21. CITY HAS NO POWER TO ERECT BRIDGE, EITHER BY ITSELF OR JOINTLY WITH INDIVIDUAL, or to aid in its erection by a loan of the corporate credit, under a power in its charter "to improve sidewalks, alleys, and streets," and "to make by-laws necessary and proper for the good regulation, safety, and health of the city." *Id.*
22. CITY HAS NO POWER TO LOAN ITS CREDIT OR MAKE ITS ACCOMMODATION PAPER for the benefit of citizens, to enable them to execute private enterprises. *Id.*
23. BUILDING OF SIDEWALKS IS LEGITIMATE MUNICIPAL OBJECT under the charter of Des Moines. *Id.*
24. WARRANTS ISSUED BY CITY IN CONSIDERATION OF ILLEGAL SCRIP issued previously by the city in payment of *bona fide* debts or in exchange for valid city warrants are valid, and not open to the objection of illegality of consideration. *Id.*
25. CITY WARRANTS ARE ADMISSIBLE IN EVIDENCE WITHOUT PROOF OF GENUINENESS OF SIGNATURE or of authority to issue them, in an action upon them against the city, if they are set out in the petition by copy and their execution is not denied under oath. *Id.*
26. BONDS IN AID OF RAILROAD COMPANY, ISSUED BY COUNTY UNDER TOWNSHIP ORGANIZATION, ARE ABSOLUTELY VOID, when the election at which their issuance is authorized is ordered by the county court instead of by the board of supervisors of the county, upon whom the statute has conferred that power exclusively. And the fact that a majority of the legal voters of the county voted at such election in favor of the issuance of such bonds will not give them validity, since the election being illegally called, the vote failed to confer the power. *Supervisors v. Cook*, 282.
27. WHERE STATUTE PROHIBITS ISSUE OF BONDS BY COUNTY UNTIL ELECTION IS HELD resulting in favor of such issue, bonds issued under an election unauthorized by law are void in the hands of all persons, whether subsequent purchasers or first holders, since they are deemed to have notice of the statute under which the bonds purport to be issued, and have access to the proceedings of the board of supervisors, which are public records. And the levy and collection by the county of taxes to pay the interest on bonds so issued does not validate them, for the doctrine of ratification does not apply where there is a want of power in public officers to perform the original act or to ratify it, but only where having such power they execute it defectively. *Id.*
28. IT IS PRESUMED, IN ABSENCE OF PROOF to the contrary, that city authorities have complied with the requirements of law in making a contract for the paving of city streets. *City of New Orleans v. Halpin*, 523.
29. IN ABSENCE OF PROOF OF FRAUD, acceptance by city of authorized contract work, upon the certificate of a public officer that it was rightly done, is *prima facie* evidence in favor of the city as to the completion and manner in which the work was performed. *Id.*

See EMINENT DOMAIN, 4; NEGLIGENCE, 27; RAILROADS, 10.

COSTS.

1. ERROR OF COURT IN REFUSING TO ALLOW PARTY COSTS cannot be reviewed on an appeal from an order denying a new trial. *Stevenson v. Smith*, 107.
2. AWARD OF COSTS IS IN DISCRETION OF COURT IN ALL SUITS IN CHANCERY which are determined by the court on a final hearing. *Blue v. Blue*, 267.

CO-TENANCY.

1. OUSTER IS NOT FOUND EITHER IN TERMS OR BY LEGAL CONCLUSIONS, by a special verdict, in an action of ejectment brought by a tenant in common against a co-tenant who is in the occupancy of the land held in common, that the plaintiff demanded of his co-tenant to be let into the immediate possession of the same, and that the co-tenant refused. *Carpentier v. Mendenhall*, 135.
2. FACT OF OUSTER OR OF INTENT TO OUST CO-TENANT MUST BE FOUND BY JURY, for the law will not presume from acts of ownership by one tenant in common, nor from his refusal to allow a co-tenant to enter, nor from both combined, that there was intent to oust. *Id.*
3. IF TENANT IN COMMON DEMAND OF HIS CO-TENANT, who is in the occupancy of the common property, to be let into possession, and the co-tenant refuses, and does not give any explanation of his refusal, the court would be justified in directing or advising the jury to infer an ouster. *Id.*
4. IF ONE UNLAWFULLY TAKING POSSESSION OF LAND AFTERWARDS BECOMES TENANT IN COMMON in the ownership of the same, the moment he becomes such tenant in common his possession loses its hostile character, and the presumption is that it remains amicable until the contrary is made to appear. *Id.*
5. IN EJECTMENT BY TENANT IN COMMON, AGAINST CO-TENANT who took possession wrongfully, but afterwards became a co-tenant, plaintiff cannot recover damages for the period during which the defendant was unlawfully in possession. *Id.*
6. TENANT IN COMMON CANNOT, IN EJECTMENT AGAINST HIS CO-TENANT, recover damages or mesne profits for the period during which the possession of the co-tenant was not adverse. *Id.*
7. TENANT IN COMMON WHO IS OUSTED BY CO-TENANT may recover damages in ejectment from the time of the ouster, according to his right. *Id.*
8. TENANTS IN COMMON MUST JOIN IN ACTIONS FOR TRESPASS TO LANDS, but their failure to do so can only be taken advantage of by plea in abatement, or by way of apportionment of the damages at the trial. *Geist v. Lynch*, 558.

See ADVERSE POSSESSION, 1; PARTITION.

COURTS.

1. WHERE TERMS OF COURT ARE FIXED BY LAW for the trial of suits, a judge cannot adopt or enforce a rule of court allowing only certain cases to be tried at a particular term. *State v. Posey*, 525.
2. MERIT INDEX OF RECORD IS NOT COMPLIANCE WITH RULE OF COURT which requires the filing of an abstract of the record. *Day v. Vallette*, 353.

COVENANTS.

- COVENANTS ARE TO BE CONSTRUED TO BE DEPENDENT OR INDEPENDENT, according to the intention of the parties and the good sense of the case. *Lunn v. Gage*, 233.

See LANDLORD AND TENANT.

CRIMINAL LAW.

1. WHEN ONE VOLUNTARILY FIRES GUN INTO CROWD WITH FELONIOUS PURPOSE OF KILLING ANOTHER, the unintentional killing, even of his friend, AM. DEC. VOL. LXXXVII—51

- would be murder; but if the firing was accidental and involuntary, it would be manslaughter. *Gallier v. Commonwealth*, 493.
2. ONE WHO FIRES RECKLESSLY INTO CROWD AND KILLS ANOTHER IS GUILTY OF MURDER, even though he fired without any special purpose. *Id.*
 3. IT IS ERRONEOUS TO INSTRUCT JURY "that drunkenness can never be received as a ground to excuse or palliate a crime," because, when and how far drunkenness may excuse or palliate must depend on its motives, degree, and effect on the mind. *Id.*
 4. INDICTMENT FOR MURDER UNDER CRIMINAL CODE of California need not describe the weapon used, the nature or extent of the wound, nor the part of the body upon which it was inflicted. *People v. King*, 95.
 5. CRIMINAL CODE OF CALIFORNIA WORKS SAME CHANGE in the pleading and practice in criminal actions which is wrought by the civil code in civil actions. *Id.*
 6. INDICTMENT FOR MURDER UNDER CRIMINAL CODE of California is not bad because it designates the degree of the murder. This may be treated as surplusage; but the indictment ought not, because it need not, state the degree of the murder. *Id.*
 7. IN MURDER TRIAL, IF THERE IS NO EVIDENCE which tends to reduce the crime charged to manslaughter, the court may instruct the jury to disregard the question of manslaughter; but if any evidence is given tending, however slightly, to reduce the homicide to manslaughter, such instruction is erroneous. *Id.*
 8. IN MURDER TRIAL, WHERE DEGREE OF OFFENSE depends upon whether the killing was willful, deliberate, and premeditated, the jury may properly be instructed to consider evidence of intoxication, not upon the ground that drunkenness renders a criminal act less criminal, or can be considered in extenuation or excuse, but to determine the condition of the defendant's mind, as to whether he was capable of deliberation or premeditation necessary to the degree of the crime charged. *Id.*
 9. IT IS NOT ERROR TO REFUSE TO GIVE INSTRUCTIONS which have already been given in substance. *Id.*
 10. IN TESTING INSTRUCTIONS GIVEN ON MURDER TRIAL, every deduction which the jury might have been authorized to make from the evidence must be assumed as a fact proved. *Philips v. Commonwealth*, 499.
 11. PRINCIPLE APPLICABLE TO MUTUAL RENCONTRE OR AFFRAY WITH DEADLY WEAPONS does not apply to a case in which the first escape from threatened assassination by a determined and persevering enemy probably would not secure the ultimate safety of the accused. In such a case the accused is not required to retreat if he can, but may stand his ground, and will be excused if he kills his assailant. *Id.*
 12. INSTRUCTION TO JURY ON TRIAL FOR MURDER HELD TO BE ERRONEOUS, given upon a statement of facts set forth in the opinion. *Id.*
 13. RAPE. — Reluctance and resistance on the part of an adult woman are essential to the commission of this offense. Perhaps an exception to this rule exists when the woman shows by her words and conduct that the act was against her will, but finally ceases to resist because of insensibility produced by liquors administered to her by the accused. *People v. Crosswell*, 774.
 14. RAPE. — SEXUAL INTERCOURSE WITH DEMENTED OR INSANE WOMAN who does not resist, and who apparently assents thereto, is not rape. If, however, a man, knowing a woman to be insane, takes advantage of that fact to carnally know her, when her mental powers are so impaired that

she is unconscious of the nature of the act, and is not a willing participator therein, his offense is rape, though there is no distinct proof of her resistance. *Id.*

15. **CERTIFICATE OF RESULT OF ANALYSIS OF MILK BY SWORN INSPECTOR**, appointed under the Massachusetts statute, is admissible in evidence in a criminal prosecution, provided he also testifies at the trial to the same facts which are stated therein; and in such case, the admission of the certificate in evidence before he testifies furnishes no ground for a new trial, after a verdict of guilty. *Commonwealth v. Waite*, 711.
16. **INFORMATION NEED NOT ALLEGE THAT ACCUSED HAS HAD PRELIMINARY EXAMINATION** or has waived it, as this is not a matter that goes to the merits of the trial, but merely to the regularity of the previous proceedings. *State v. Barnett*, 471.
17. **SUFFICIENCY OF INFORMATION MUST BE DETERMINED BY SAME RULES THAT GOVERN INDICTMENTS.** *Id.*
18. **PRECISE TIME OF COMMISSION OF OFFENSE NEED NOT BE STATED IN INDICTMENT** if it is shown to have been within the statute of limitations, except when the time is an indispensable ingredient in the offense. *Id.*
19. **INFORMATION NEED NOT DESCRIBE OFFENSE IN EXACT WORDS OF STATUTE** if the meaning of the words used is substantially the same, where it is provided by statute that the words used in a statute to define a public offense need not be strictly pursued, but other words conveying the same meaning may be used. *Id.*

See **ARREST.**

CUSTOMS.

1. **C., HAVING LUMBER SAWED AT MILL, MAY BE, ACCORDING TO CUSTOM OF FORMER YEARS, JUSTIFIED IN MAKING PAYMENT** for the sawing to J., or other persons who have charge of the mill, where a private contract exists between G., the lessee of the mill, and J., or other persons, that the latter will not collect the bills for sawing, but of which contract C. has no notice. *Green v. Clay*, 622.
2. **SAWING LUMBER, WHO MAY CONTRACT AND RECEIVE PAYMENT FOR.** — A person put in charge of a saw-mill by an agent of the lessee or owner thereof may contract with others to saw lumber for them, and, in the absence of a known contract to the contrary, may lawfully receive payment in money or otherwise for such lumber sawed by him at the mill. And evidence of a custom in former years to make such payments to other persons so put in charge of the mill is competent, though not material. *Id.*

DAMAGES.

1. **PARTY WHO HAS CUMULATIVE REMEDIES** against one or several persons to recover damages for a tort, cannot, after recovering in one form of action, recover from the same party for the same wrong in another form of action; nor, if the remedy be against several, and he recover from one, can he recover from the others for the same cause of action. *State v. Bishop and Murray*, 608.
2. **PARTY CANNOT CLAIM EXEMPTION FROM LIABILITY** for his debt or contract, or reduce the amount of recovery, on the ground that some other person, who is a stranger to him, and not liable on the same obligation, has, under a mistake of law or fact, paid and indemnified the debt or obligation. *Id.*

3. **DAMAGES NOT NECESSARILY ACCRUING FROM ACT COMPLAINED OF ARE SPECIAL**, and must be pleaded with particularity, and so as to show the facts out of which they arise, or they cannot be recovered. *Stevenson v. Smith*, 107.
4. **IN ACTION AGAINST SHERIFF FOR WRONGFUL ATTACHMENT OF MARE**, and for damages for its detention, a claim for damages because the animal has lost flesh, in consequence of having been kept upon short pasturage, and because she was detained during the breeding season, is a claim for special damages, which must be specially and specifically pleaded. *Id.*
5. **DAMAGES AGAINST RAILROAD COMPANY FOR INJURY TO PASSENGER MAY COVER** the loss, expense, and injury arising at the time of the accident, the bodily pain and mental suffering, and the prospective loss and damage arising from bodily disability, impairment of intellectual faculties or general health, which lessen the passenger's ability of attending to his business, as he could have done had not the injuries been received. *Illinois Central R. R. Co. v. Read*, 260.
6. **DEFENDANT MAY INTRODUCE EVIDENCE TO PROVE CONTRIBUTORY NEGLIGENCE OF PLAINTIFF**, for the purpose of reducing the damages to a nominal sum, upon a hearing in damages, after the overruling of the defendant's demurrer to a declaration charging an injury by his negligence. *Daily v. New York etc. R. R. Co.*, 176.
7. **EVIDENCE, AS AFFECTING QUESTION OF DAMAGES FOR NEGLIGENTLY CAUSING DEATH OF PERSON, MAY BE PROPERLY GIVEN**, of exact situation of the deceased, his occupation, annual earnings, age, health, habits, and estate, if the jury be guarded by an instruction that if they find for the plaintiff, they should allow such damage as the estate of the deceased suffered pecuniarily by his death, but should not allow anything on account of his pain and suffering before his death, or for the grief and distress of his family on account thereof, or for the loss of his society. *Dowdson v. Mississippi etc. R. R. Co.*, 391.
8. **IN ACTION BY MOTHER TO RECOVER FOR INJURIES** to her infant son, suffered at the hands of a railroad company at a time when he was not a passenger, she is not entitled to recover for her mental suffering, but only such pecuniary loss as would be sustained by her from loss of the services of the child during his minority. The chances of survivorship, his ability or willingness to support her, are matters of conjecture too vague to enter into an estimate of damages merely compensatory. *State v. Baltimore etc. R. R. Co.*, 600.

See EMINENT DOMAIN, 2; GUARDIAN AND WARD, 1, 3, 5.

DEBTOR AND CREDITOR.

See JUDGMENTS; NOTICE

DEEDS.

1. **DEED MADE ON SUNDAY IS VOID.** *Love v. Wells*, 375.
2. **DEED TAKES EFFECT FROM TIME OF ITS DELIVERY**, and though signed and acknowledged on Sunday, if delivered on another day it is a valid deed, whatever may be the effect upon the acknowledgment. *Id.*
3. **ONE WHOSE DEED IS EXECUTED ON SUNDAY, BUT WHICH BY PROCUREMENT OF GRANTOR** is dated upon the preceding day, cannot assert the invalidity of the deed against a subsequent bona fide purchaser. *Id.*

4. **PARTY SIGNING AND DELIVERING INSTRUMENT TO ANOTHER, AS HIS DEED,** in an imperfect state, must be held as agreeing that the blanks may be filled after he has executed it; and this principle includes the insertion of the penal sum of a collector's bond. *Inhabitants of South Berwick v. Huntress*, 535.
 5. **MISTAKE OF GRANTOR AS TO LEGAL EFFECT OF LANGUAGE USED IN DEED,** if the language is such as he intended should be used, will not afford him any ground of relief in equity. *Burt v. Wilson*, 142.
 6. **COURTS OF ONE STATE CANNOT ANNUL DEED OF LANDS IN ANOTHER STATE** duly recorded therein, even though it appear that such deed was fraudulently obtained. But if a court of equity in the former state has acquired jurisdiction of the person of one who has by fraud obtained a deed for land lying in another state and had it recorded there, it may decree that he and his grantee, if the latter is not entitled to be protected as a *bona fide* purchaser, shall release their claims acquired under such fraudulently obtained deed; and if they refuse to do so they may be attached for contempt and held in custody until they execute the decree; and if in the mean time it be made to appear that they are seeking to encumber the title by conveyances to third persons, that may be treated as a contempt for which the court may attach and punish them; and if they go beyond the jurisdiction, the court can appoint a special commissioner to make the conveyance in their stead. *Cooley v. Scarlett*, 298.
 7. **RECITALS IN DEED TO WHICH DEFENDANT IS PARTY AND PLAINTIFF STRANGER** are admissible in evidence as simple admissions only, made by the party by whom the deed was executed. *Franklin v. Dorland*, 111.
- See **BOUNDARIES**; **ESTOPPEL**, 9, 10; **HOMESTEADS**, 1; **VENDOR AND VENDEE**.

DOMICILE.

See **MARRIAGE AND DIVORCE**, 1, 2.

DOWER.

1. **WIDOW IS ENTITLED TO DOWER IN FLATS OWNED BY HER HUSBAND**, although they are covered by tide-waters, and remain unimproved down to the time of his death. *Brackett v. Persons Unknown*, 548.
2. **WIFE'S INCHOATE INTEREST IN HER HUSBAND'S LANDS IS NOT LOST BY MORTGAGE** of such lands by him and foreclosure sale thereunder, where the wife was not a party to the mortgage; and the fact that the lands were afterwards sold on partition, to which the widow was not a party, would not divest her of her contingent interest. *Verry v. Robinson*, 346.

DUE PROCESS OF LAW.

See **CONSTITUTIONAL LAW**, 1.

DYING DECLARATIONS.

See **EVIDENCE**, 2.

EJECTMENT.

- IF ONE WHO IS NOT OWNER OF LOT OF LAND, AFTER EXECUTING DEED** of it to another, is placed in possession of the lot by the real owner, he may avail himself of this possession as a defense in ejectment brought against him by his grantee. *Franklin v. Dorland*, 111.

See ADVERSE POSSESSION, 5; CO-TENANCY, 5-7; ESTOPPEL, 7-10; PUBLIC LANDS, 6, 7.

ELECTIONS.

1. REGISTRATION LAW MAY BE SAID TO HAVE BEEN CARRIED INTO EFFECT when the registrars have been appointed for every county in the state, and have entered upon and are discharging their duties. *Hardisty v. Traft*, 584.
 2. REGISTRATION OFFICERS ARE PROPERLY QUALIFIED BY TAKING AND SUBSCRIBING OATH IN REGISTRATION BOOK before any one having authority to administer oaths. It is not necessary that they should take the oath before the clerk of the circuit court, and subscribe thereto in his test book. *Id.*
 3. EQUITY JURISDICTION—REMEDY AT LAW.—Where registration law provides for days for the correction of errors and supplying omissions in register of voters, if the registration officers misconceive their duty in any respect, or violate their trust by asking questions of applicants for registration which the law does not warrant, it is not for a court of equity to apply the remedy by injunction, and arrest their proceedings because one or more may not have been fairly dealt with. Nor will the joinder of several of the latter give equity jurisdiction, upon the ground of preventing a multiplicity of suits. *Id.*
- See CONSTITUTIONAL LAW, 6, 8; INJUNCTIONS; OFFICE AND OFFICERS, 4, 5.

EMINENT DOMAIN.

1. IN DETERMINATION OF PUBLIC UTILITY OF PROPOSED HIGHWAY, while it is necessary to consider the wants of the particular neighborhood which desires it, yet the interests of the community outside of such neighborhood ought not to be disregarded. *Crossley v. O'Brien*, 329.
2. IN DETERMINATION OF PUBLIC UTILITY OF PROPOSED HIGHWAY, damages which, if it were established, would have to be paid for the land appropriated ought to be taken into consideration. *Id.*
3. THAT IS NOT TO BE DEEMED HIGHWAY OF PUBLIC UTILITY which, if established, would render unfit for use another of much greater importance, as, for example, an important line of railway, or make the transit of passengers upon the latter seriously dangerous. *Id.*
4. GROUND USED FOR RAILWAY OWNED BY PRIVATE CORPORATION, if it can be appropriated at all, in whole or in part, under the right of eminent domain, cannot be so appropriated without being paid for. *Id.*
5. APPEAL LIES FROM DECISION OF COUNTY BOARD, UPON PETITION FOR HIGHWAY, to the effect that the road should not be established unless the petitioners would pay damages fixed by the viewers, who reported that the road would not be of public utility, and assessed damages in favor of certain of the persons through whose lands it would pass. *Id.*
6. IN PROCEEDING TO ESTABLISH HIGHWAY, OBJECTION THAT NAMES OF PERSONS THROUGH WHOSE LANDS IT WILL PASS are not sufficiently denoted in the petition is waived if not made before the appointment of viewers, especially if not made by such persons themselves. *Id.*
7. IF VIEWERS APPOINTED TO LAY OUT HIGHWAY FIND "INCLOSURE" ON ROUTE petitioned for, the owner of which will not consent that the road shall be located through it, and they ascertain that a good route for a road can be otherwise had, they cannot locate the road through such

inclosure; nor can they locate it upon such other route if such route would be an essential departure from the route mentioned in the petition. *Id.*

6. IF REPORT OF VIEWERS APPOINTED TO LAY OUT HIGHWAY IS SILENT CONCERNING INCLOSURE on the route, it will be presumed that there is none, or that the owner has given the consent required; and the same presumption will be entertained where the decision of the county board has been appealed from, and tried by a jury, and a general verdict has been rendered for the petitioners. *Id.*
9. COURSE OF PROCEEDING REQUIRED BY STATUTE WHEN INCLOSURES INTERFERE is not prerequisite to the jurisdiction of the county board to establish a highway. *Id.*
10. JURISDICTION WILL NOT BE DEEMED TO HAVE BEEN ACQUIRED BY COUNTY BOARD to establish a highway unless the facts necessary to give the jurisdiction appear affirmatively on the record; but when the jurisdiction has been obtained, the same presumption will be indulged in favor of the regularity of all subsequent proceedings as is entertained in ordinary cases in courts of general jurisdiction. *Id.*

EQUITY.

1. FACT THAT PERSON IS UNLEARNED AND IGNORANT OF LEGAL PROCEEDINGS AFFORDS NO GROUND OF RELIEF in equity, unless it also appears that he relied for information upon the person against whom relief is sought, and the latter misrepresented the state of the facts. *Boyd v. Blankman*, 146.
2. MONEY DIRECTED TO BE EMPLOYED IN PURCHASE OF LAND, and land directed to be sold and turned into money, are to be considered as that species of property into which they are directed to be converted. *Rankin v. Rankin*, 205.

See DEEDS, 3; ELECTIONS, 3; JUDGMENTS; OFFICE AND OFFICERS, 4, 5; STATUTE OF LIMITATIONS, 1

ESTATES OF DECEDENTS.

See EXECUTORS AND ADMINISTRATORS.

ESTOPPEL.

1. ESTOPPEL IN PAIS IS IMPEDIMENT OR BAR TO ASSERTION OF RIGHT OF ACTION arising by a man's own act, or where he is forbidden by law to speak against his own act. It extends to and binds privies in blood, privies in estate, and privies in law. *Mills v. Graves*, 314.
2. EVERY ESTOPPEL TO BE BINDING OUGHT TO BE RECIPROCAL, and should bind both parties, and therefore a stranger can neither take advantage of nor be bound by an estoppel. *Id.*
3. ESTOPPEL MUST BE CERTAIN TO EVERY INTENT, and must not be taken by argument or inference. Every estoppel ought to be a precise affirmation of that which creates the estoppel, and not by way of recital. *Id.*
4. MERE LOOSE EXPRESSIONS INADVERTENTLY MADE IN IGNORANCE OF PARTY'S RIGHTS, or declarations ambiguous in their character, cannot create a bar to the assertion of the truth. *Id.*
5. DECLARATIONS NOT ACTED UPON CAN NEVER OPERATE AS ESTOPPEL. Mere declarations to strangers, unless communicated to and acted upon by the

- party, will not operate as an estoppel. And generally, when the avenues of information are equally open to both parties, there will be no bar. *Id.*
6. OWNER OF LAND HAVING HIS TITLE DULY RECORDED HAS GIVEN ALL INFORMATION of his claim that is required by law. *Id.*
 7. PLAINTIFF IN EJECTMENT SHOWING TITLE IN HIMSELF AND HIS GRANTOR DULY RECORDED IS NOT ESTOPPED by declarations made by such grantor to the effect that he had conveyed the lands in question to the grantors of the defendant, who owned the adjoining lands, and that he no longer had any interest in such lands, where such declarations were neither made nor communicated to the defendant or to any of his grantors before their purchase of such adjoining lands, and were not an inducement to such purchase. *Id.*
 8. ESTOPPEL IN PAIS CANNOT BE MADE AVAILABLE IN COURT OF LAW in an action of ejectment. *Id.*
 9. DEFENDANT IN EJECTMENT IS NOT ESTOPPED BY HIS DEED, as against plaintiff, who is an entire stranger thereto. *Franklin v. Dorland*, 111.
 10. DEED OF DEFENDANT IN EJECTMENT WILL NOT OPERATE AS ESTOPPEL IN PAIS upon him, as against the plaintiff, who is a stranger thereto, in regard to the description of the land stated therein, if it does not appear that such description was inserted with a view to influence the plaintiff in the conduct of his own affairs, or that he was influenced by it in fact. *Id.*

See ATTACHMENT, 5; DEEDS, 7; MARRIED WOMEN, 1.

EVIDENCE.

1. EVIDENCE THAT NUMBER OF PERSONS PASSED ALONG SIDEWALK WITHOUT HARM is admissible, in an action to recover damages for injuries received from slipping on a formation of ice extending entirely across the sidewalk, to show that the ice was not slippery and dangerous, for the attention of all who passed over the sidewalk would necessarily be drawn to the ice, and their experience be substantially the same. *Calkins v. City of Hartford*, 194.
2. IN CIVIL SUIT, DYING DECLARATIONS OF PERSON FATALLY INJURED by the act of another, as to the facts attending the injury, are not admissible in evidence against the defendant. Such declarations are only admissible in criminal cases, where the death of the deceased is the subject of the charge, and the circumstances of the death the subject-matter of the declaration. *Daily v. New York etc. R. R. Co.*, 176.
3. EVIDENCE THAT ORIGINAL CHARGE ON BOOKS OF ACCOUNT WAS MADE TO CERTAIN PERSON IS PRIMA FACIE ONLY, and not conclusive evidence that the contract was made with him or upon his credit. *Bangfeld v. Whipple*, 618.
4. EVIDENCE ON CROSS-EXAMINATION IS ADMISSIBLE, where, in an action against an express company for the loss of a package of money, the company proves by its agent the custom of its drivers in regard to the delivery of parcels and taking of receipts, and the cross-examination shows that the driver who had the package had stolen packages of money, and that some time after the loss of the package the company arrested the driver, and made him surrender some money and jewelry, and that he escaped from the officer and ran away. *American Express Co. v. Haggard*, 257.
5. KNOWLEDGE, BELIEF, OR INTENTION OF WITNESS MAY BE GIVEN IN EVIDENCE, when it is a material fact, giving to the opposite party a liberal scope in the cross-examination; but in such a case the court should state

to the jury that in judging of the knowledge, belief, or intention of the witness, they should consider all the facts and circumstances, and that the statement of the witness in that respect is not conclusive. *Watson v. Chesire*, 382.

6. CARLISLE TABLES ARE ADMISSIBLE IN EVIDENCE TO SHOW EXPECTATION OF HUMAN LIFE, they being standard tables on that subject. *Donaldson v. Mississippi etc. R. R. Co.*, 391.
7. DEFENDANT WHO HAS NOT BEEN CALLED UPON TO STATE WHETHER HE EXPECTED TO PROVE all the facts essential to his defense should not be prevented from testifying because his offer does not embrace every fact necessary to establish it. *Tyler v. Green*, 130.

See SET-OFF.

EXECUTIONS.

1. TAKING OUT EXECUTION ON ONE OF SEVERAL SEPARATE JUDGMENTS recovered against several joint trespassers is an election by the plaintiff to enforce that judgment, and though he fails to obtain satisfaction he cannot sustain an action upon any of the other judgments. *Boardman v. Acer*, 736.
2. ASSIGNMENT BY EXECUTION DEFENDANT OF RIGHT TO REDEEM CONFERS UPON ASSIGNEE NO HIGHER RIGHT than the assignor himself possessed, and a redemption by such assignee leaves the property subject to be taken in satisfaction of any subsisting lien thereon, to the same extent that it might be taken if in the hands of the execution defendant. *Stein v. Chambliss*, 411.
3. EXECUTION SALE IS IRREGULAR, BUT NOT VOID, where an execution was levied upon property and the sale made under an *alias* instead of a *conditioni exponas*. *Id.*
4. EXECUTION SALE MAY BE COMPLETED AFTER RETURN DAY, where the execution is levied before its expiration. *Id.*
5. PURCHASER OF LAND AT SHERIFF'S SALE WHO RECEIVES PORTION OF REDEMPTION MONEY from the judgment debtor, and agrees to give him time for the payment of the residue, without stipulating that unless the residue be paid by a specified time he shall have the right to take out his sheriff's deed, so far waives his right to the sheriff's deed that he is not entitled to it if he neither tenders back the money received nor gives notice of his intention to rescind the contract, and take out a deed, unless the residue be paid within a reasonable time. *Kaufman v. Smallwood*, 230.
6. MORTGAGEE HAS RIGHT TO REDEEM LAND FROM SALE UNDER EXECUTION, though the liability secured by the mortgage is a contingent one which may never ripen into a certainty. *Cronsen v. White*, 420.
7. WHERE PURCHASER AT EXECUTION SALE FAILS TO PAY AMOUNT OF BID, and judgment is taken against him for the amount of the bid and damages, there is no equitable lien upon the land in favor of the execution plaintiff for the purchase-money. *Day v. Vallette*, 353.
8. INJUNCTION TO PREVENT SALE UNDER EXECUTION. — Where it appears that property which belongs *bona fide* to complainant is about to be sold under execution as the property of third persons, and where the bill alleges that this property constitutes his stock in trade and merchandise, that the consequences of permitting it to be seized and sold would utterly destroy his trade, credit, and business as a merchant, and deprive him of

the means of support, an injunction will issue, as this case presents elements of apprehended damage and injury which could not be redressed at law. *McCreery v. Sutherland*, 578.

9. INJUNCTION MAY ISSUE TO RESTRAIN PROCEEDINGS ON EXECUTION issued on an alternative judgment for the value of property replevied in default of a return thereof, where the property has been tendered back within a time that is reasonable under all the circumstances of the case, especially where the plaintiff has paid all the costs of the replevin suit, is the real owner of the property, and offered to return the property so as to open the way for a new demand and recovery of the property by suit. *McNiell v. Marshall*, 454.
10. INJUNCTION, THOUGH ADJUDGED TO HAVE BEEN WRONGFULLY SUED OUT, RELEASES LEVY and discharges the lien created by the levy of an execution. *Lockridge v. Biggerstaff*, 498.
11. CREDITOR WHOSE EXECUTION HAS BEEN LEVIED AND THEN ENJOINED should, upon the dissolution of the injunction, take out a new execution. *Id.*
12. ORDER OF COURT DIRECTING ASSIGNEES OF NOTE, RECEIVED IN PAYMENT OF PRE-EXISTING DEBT, to be made parties to a proceeding supplementary to execution which had been commenced after such assignment, for the purpose of trying the question whether they were holders of the paper in good faith, and also directing the payment into court of the money due upon the notes, is not authorized by the Indiana statute. *McKnight v. Kniesly*, 364.
13. APPEAL WILL LIE TO SUPREME COURT FROM INTERLOCUTORY ORDER directing the payment of money into court, in a proceeding supplementary to execution. *Id.*

See ATTACHMENTS, 3; HOMESTEADS.

EXECUTORS AND ADMINISTRATORS.

1. PROBATE COURTS WERE ALWAYS OPEN FOR PURPOSE OF GRANTING LETTERS OF ADMINISTRATION, under the Illinois act in force in August, 1849, and no extraordinary circumstances needed to be shown to authorize a special term to be held for that purpose. *Schnell v. Chicago*, 304.
2. ADMINISTRATION DE BONIS NON. — Statute providing for letters *de bonis non* at the discretion of the court, giving preference to the person entitled, if he shall actually apply for the same, does not mean that the orphans' court may capriciously appoint whom it pleases, when it pleases, without notice or opportunity to be heard to those entitled to make application; the statute necessarily imports that the person entitled shall have notice and a day in court to make such application. *Thomas v. Knighton*, 571.
3. IN APPLICATION FOR ADMINISTRATION DE BONIS NON, the same reason requiring notice to those entitled to administration in the first instance applies to this latter application, as the completion of an administration is often more important to all concerned than the commencement. *Id.*
4. WHERE WOMAN IS ENTITLED TO ADMINISTRATION AND RENOUNCES HER RIGHT, and recommends the appointment of another as administrator *de bonis non*, who is appointed as such without notice, and where she afterwards petitions the court for restoration, claiming that her renunciation was procured by mistake, the court, upon being satisfied of the mistake, should cancel its appointment and restore her to her right of administration, and it is error to appoint the one next entitled pending the hearing of her petition. *Id.*

5. WHERE, PENDING APPEAL FROM ORDER APPOINTING ADMINISTRATOR DE BONIS NON, but before the appeal bond is filed, upon the petition of the appointee the court makes an order associating another person with him in the administration, such order, not being one which would prevent the court from conforming to the decision of the court of appeals, is not stayed by the first appeal, but being a modification of the order first appealed from, must stand or fall with it. *Id.*
6. POWERS OF ADMINISTRATORS APPOINTED IN DIFFERENT STATES extend only to the limits of the sovereign creating them, and neither allows the other to intermeddle with any assets within their respective jurisdictions. *Barbank v. Payne*, 513.
7. WHEN PARTY DIES, LEAVING PROPERTY in two or more states or countries, his property in each is considered a separate succession for the purposes of administration, the payment of debts, and the decision of the claims of parties asserting title thereto. *Id.*
8. ADMINISTRATOR NEED ONLY ADOPT SUCH PRECAUTIONS AGAINST LOSS OF PROPERTY BY FIRE as prudent men are, under similar circumstances, accustomed to exercise; and therefore, where it appeared that mill-owners were not accustomed to insure, it was held that an administrator, receiving a mill as part of his decedent's estate, was not liable, on its loss by fire, for failure to insure. *Rubottom v. Morrow*, 324.
9. ADMINISTRATOR IS NOT CHARGEABLE, ORDINARILY, WITH RENTS OF REAL ESTATE which accrued during his administration. *Id.*
10. REAL ESTATE, UNLESS OTHERWISE DISPOSED OF, GOES TO HEIRS, and not to the executor, and a mere power given to the executor to sell real estate does not give him a right to the possession thereof; but to entitle him to such possession, the land or its usufruct must be expressly given to him by the will. *Id.*
11. EXECUTORS HAVE POWER TO SELL LAND OF TESTATOR WITHOUT DECREE OF COURT OF EQUITY where the testator directs the land to be sold, and the proceeds to be distributed to certain persons, without declaring by whom the sale shall be made; for such disposition is to be regarded as a bequest of a fund distributable to the legatees by the executors, who therefore take by implication the power to sell the land and convert it into money without a decree of court. *Rankin v. Rankin*, 205.
12. EXECUTOR TAKES POWER OF SALE BY IMPLICATION where a testator directs his estate to be sold for certain purposes, without declaring by whom the sale shall be made, provided the proceeds are distributable by the executor. *Id.*
13. IN COLLATERAL PROCEEDING INVOLVING TITLE TO LAND SOLD BY ADMINISTRATOR, it will be presumed that the probate court which appointed the administrator had before it proof of the facts necessary to authorize it to make such appointment, and to give it power to act in the case, although on a direct appeal or writ of error from the probate proceeding it would be held irregular and set aside. *Schnell v. Chicago*, 304.
14. WHERE PETITION OF ADMINISTRATOR FOR ORDER TO SELL LANDS DESCRIBES THEM CORRECTLY as certain lots in section 33, but the abstract accompanying the petition and the inventory from which the abstract is required to be taken describe them as being in section 23, and the order of sale directs the lands in the petition to be sold, namely, lots, etc., in section 23, the notice of sale and the deed made to the purchaser describing the lands correctly, it will be held in a collateral proceeding involving the title that the misdescription of the section was a mere clerical error, not affecting the validity of the sale. *Id.*

15. WHERE ADMINISTRATOR GIVES NOTICE THAT HE WILL APPLY AT CERTAIN TERM OF COURT FOR ORDER to sell lands of the estate for the payment of debts, he must file his petition at the term designated in the notice, and if he does not file his petition until a term subsequent to that named in his notice, all the proceedings under it will be void. The presumption is, on such notice, and a failure to file the petition at the term specified, that the application is abandoned. To charge the heirs or parties in interest, it is necessary that the notice should be renewed in all cases where the petition is not filed in pursuance of the notice. *Id.*
16. MINOR HEIRS ARE NOT ESTOPPED FROM ASSERTING TITLE TO LANDS of their ancestor, sold by an administrator under a void order, by the mere fact that their guardian received a portion of the proceeds of the sale and applied it to their use, where it is apparent from their nonage, ignorance, and position that they knew nothing of the proceedings of the administrator on the estate, and their guardian never made any settlement with them of his trust, by which they could know the true state of the facts. *Id.*
17. WHERE AGENT OF PURCHASER AT ADMINISTRATOR'S SALE ENTERS INTO ARRANGEMENT WITH ADMINISTRATOR that the latter shall sell two lots of land together, if the lots are sold for an inadequate price, the sale will be declared invalid; but where the lots so sold bring an adequate price and no one is injured by the arrangement, the irregularity will be disregarded. *Id.*
18. EXECUTOR'S SALE AND CONVEYANCE OF REAL ESTATE IS VOID AND WILL BE SET ASIDE, where the executor gives notice to the heirs that he would apply at a certain term of the court for a license to sell, but he makes no application at that term, and without further notice applies at a subsequent term. *Morris v. Hogle*, 243.
19. PETITION BY EXECUTOR TO SELL REAL ESTATE SHOULD STATE NAMES OF HEIRS, but, it seems, this defect cannot be taken advantage of in a collateral proceeding. *Id.*
20. DECREE AUTHORIZING EXECUTOR TO SELL SO MUCH REAL ESTATE AS HE MAY DEEM FOR BEST INTEREST OF ESTATE IS ERRONEOUS. The court is only authorized to license a sale of so much real estate as is necessary to pay debts. *Id.*
21. ORDER OF SALE OF REAL ESTATE, MADE BY PROBATE COURT HAVING ACQUIRED JURISDICTION, cannot be attacked in a collateral proceeding on the ground that it was made upon insufficient evidence or contrary to the evidence, or because the sale of a small portion of it would have been sufficient, or because the administrator procured it to be made to pay a debt which had previously been paid with funds of the estate. *Boyd v. Blankman*, 146.
22. ADMINISTRATOR'S NOTICE OF APPLICATION FOR ORDER OF SALE OF DECEDENT'S REALTY is sufficient, notwithstanding the objection that it was not dated, and no state was named, where the notice stated that the application would be made "at the next term of the Fulton County circuit court, to be holden in Lewiston, on the second Monday in March next," and the notice was published in a newspaper printed in Lewiston, Fulton County, Illinois, the first publication being in October preceding the March term, when the petition was filed. *Goudy v. Hall*, 217.
23. NO SPECIAL FORM OF NOTICE OF APPLICATION FOR ORDER OF SALE OF DECEDENT'S REALTY being given by statute, such notice is not to be subjected to hypercriticism; and the simple question is, Would any person

- reading it be advised of the time and place when and where the petition would be presented, and its objects? *Id.*
24. PARTICULAR DAY IN TERM ON WHICH PETITION FOR LEAVE TO SELL DECEDENT'S REALTY will be presented need not be named in the administrator's notice thereof. *Id.*
 25. FAILURE OF GUARDIAN AD LITEM TO ANSWER FOR ONE OF INFANT HEIRS a petition for an order of sale of a decedent's realty does not affect the jurisdiction of the court to pronounce its decree, since jurisdiction of the persons is acquired by publication of the notice. *Id.*
 26. REVERSAL OF DECREE BY VIRTUE OF WHICH ADMINISTRATOR SOLD LAND does not divest title of a third person purchasing at the sale, or those claiming under him, if the court had jurisdiction of the parties and subject-matter. *Id.*
 27. WHERE ADMINISTRATOR, THROUGH ANOTHER PERSON, PURCHASES AT SALE MADE BY HIMSELF, under an order of the probate court, land of his intestate, which is subsequently conveyed to him by such person, the heir retains such an equitable interest in the land as may be assigned, and the assignee may maintain an action against the administrator to enforce the trust. *Boyd v. Blankman*, 146.
 28. HEIR RETAINS EQUITABLE TITLE TO LAND OF INTESTATE PURCHASED BY ADMINISTRATOR, through another person, at a sale thereof made by him under an order of the probate court, and the heir's deed conveys such equitable title, although the legal title is held by the administrator in trust. And the execution of such deed is evidence of the heir's intention to disaffirm the sale. *Id.*
 29. UNTIL HEIR AFFIRMS SALE BY ADMINISTRATOR OF LAND OF INTESTATE, at which he himself, *per interpositam personam*, became the purchaser, the relation of trustee and *cestui que trust* between them is not shifted from the land to the proceeds of the sale of it. *Id.*
 30. PURCHASE, THROUGH ANOTHER PERSON, OF LAND OF INTESTATE BY ADMINISTRATOR, at his own sale, is not void, but only voidable at the election of the heirs or other persons interested in the estate, who may have the sale set aside and the administrator declared a trustee. *Id.*

EXEMPTIONS.

PURCHASE PRICE OF EXEMPT PROPERTY — SET-OFF. — A housekeeper, with a family, sold his only cow to enable him to buy one that gave milk, the purchaser knowing at the time the object of the sale. *Held*, that the seller was entitled to recover the whole price of the cow in money from the purchaser, and the latter could not set-off against it any debt he might hold against the former. *Muliken v. Winter*, 495.

See HOMESTEADS.

FERRIES.

FERRY COMPANY, AS COMMON CARRIER OF PASSENGERS, IS BOUND TO FURNISH reasonably safe and convenient means for the passage of teams from its boats, appropriate to the nature of its business, and to exercise the utmost skill in the provision and application of the means so employed; but it is not bound to adopt and use a new and improved method because it is safer or better than the method then employed, if it is not requisite to the reasonable safety or convenience of passengers, and if the expense is excessive. *Le Barron v. East Boston Ferry Co.*, 717.

FIXTURES.

1. HOUSE SITUATED UPON REAL ESTATE at the time that the latter is mortgaged forms a part of the realty, and as such is affected by the mortgage lien. *Buckout v. Swift*, 90.
2. SEVERANCE OF HOUSE FROM LAND changes the character of the former from real to personal property, irrespective of the means by which the severance was accomplished. *Id.*
3. WHILE HOUSE IS YET UPON MORTGAGED LAND, the mortgagor, or those claiming under him, may remove it, and the removal will not be enjoined, except upon proof that the land without the house would be an inadequate security for the mortgage debt. *Id.*
4. WHEN HOUSE IS REMOVED FROM MORTGAGED LAND, it is withdrawn from the operation of the mortgage lien, and the mortgagor may sell it, and the purchaser may convert it to his own use. *Id.*

FORCIBLE ENTRY AND DETAINER.

ALTHOUGH TITLE TO LAND CANNOT BE INQUIRED INTO FOR ANY PURPOSE IN ACTION OF FORCIBLE DETAINER, yet a plaintiff seeking to recover in such an action as a purchaser at a sheriff's sale must produce a valid judgment, an execution, and a deed for the premises on a sale by the sheriff under such a judgment. To require him to show that his purchase was legal and valid is not requiring the trial of title in such action. *Johnson v. Baker*, 293.

FRAUD.

1. PERSON DOES NOT BY ATTEMPTING TO DEFRAUD ANOTHER FORFEIT HIS PROPERTY to the latter. *Blue v. Blue*, 267.
2. COMPLAINT IN ACTION FOR RELIEF ON GROUND OF FRAUD SHOULD AVER that the acts constituting the fraud had been discovered within three years; but if the replication contains such an averment, and this issue is tried without objection, the irregularity in the mode of presenting the issue will be disregarded. *Boyd v. Blankman*, 146.

See STATUTE OF LIMITATIONS.

FRAUDULENT ASSIGNMENTS.

ASSIGNMENT OF PROPERTY TO ESCAPE LIABILITY FOR TORT. — In an action to recover damages for an injury to a hired horse, occasioned by immoderate driving, evidence is competent to prove that the defendant, immediately after the injury charged, made an assignment of all his property. *Banfield v. Whipple*, 618.

GARNISHMENT.

See ATTACHMENT.

GUARDIAN AND WARD.

1. RIGHT OF ACTION ON GUARDIAN'S BOND does not arise in favor of a corporation who pays to a ward the value of stock owned by him, and illegally transferred by the guardian, such payment being made under condition that the ward should institute suit on the bond and have the action entered for the use and prosecuted for the benefit of the corporation. The latter is entitled to maintain an action against the guardian to recover the price paid him for the stock. *State v. Bishop and Murray*, 608.

2. **WHERE GUARDIAN ILLEGALLY SELLS AND TRANSFERS** the property of his ward contrary to law, without previous order of court, and converts the proceeds to his own use, it is no answer to an action on his bond by the ward that under the law the sale itself is void, and passed no title to the purchaser. *Id.*
3. **MEASURE OF DAMAGES AGAINST GUARDIAN** in an action on his bond by the ward, for the illegal disposition of the latter's property by the guardian without order of court, and a conversion of the proceeds to his own use, is the value of the property illegally converted, if nothing else appears in proof. *Id.*
4. **WHERE GUARDIAN ILLEGALLY TRANSFERS CORPORATE STOCK** standing in the name of the ward without order of court, and converts the proceeds to his own use, the ward is not confined to his action on the guardian's bond, but has the cumulative remedy against the corporation. He may repudiate the transfer as void, and recover the stock. *Id.*
5. **MEASURE OF DAMAGES IN SUIT ON GUARDIAN'S BOND.**—Where ward has recovered from a corporation the value of stock owned by him, and illegally transferred by his guardian, the measure of damages in a suit on the latter's bond is the loss actually suffered by the ward from the breach of the bond. *Id.*

HIGHWAYS.

WHERE HIGHWAY IS LAID OUT TO NAVIGABLE WATER AND THERE TERMINATES, the terminus may be presumed to have been intended for a public landing as an incident to the highway. But this presumption does not arise in the case of a highway running from place to place along the shore of a navigable stream, and in immediate contact with it for a considerable distance. The question in such case depends on the circumstances, and is one of fact to be determined by the jury. *Burrows v. Gallup*, 186.

See EMINENT DOMAIN.

HOMESTEADS.

1. **JUDGMENT RENDERED PRIOR TO ADOPTION OF CONSTITUTION IS NOT EXCEPTED** from the operation of the homestead exemption clause by the clause providing that all contracts, judgments, etc., shall continue after the change from a territorial government to a state government as if no change had taken place, since the object of this clause was to save the right to enforce all contracts, judgments, etc., leaving the means of enforcing them subject to such changes as the constitution or legislature under it might make, and not to prohibit a change of remedy. *Cusic v. Douglass*, 458.
2. **EXEMPTION LAWS APPLY TO REMEDY ONLY, AND MAY AFFECT PRIOR CONTRACTS** without impairing the obligation thereof, so long as they are within the dictates of sound policy, humanity, and the well-being of the community; and within these limits the state is the sole judge of the extent of the exemptions. *Id.*
3. **CONSTITUTIONAL PROVISION EXEMPTING AS HOMESTEAD 160 ACRES** of farming land, or one acre within the limits of any incorporated city or town, does not impair the obligation of contracts, notwithstanding the value may vary greatly with the size of the city or the nearness of the land thereto; since the average of the homesteads is not unreasonable. *Id.*
4. **STATE IS NOT OMNIPOTENT AS TO AMOUNT OF PROPERTY TO BE EXEMPTED AS HOMESTEAD**, and its action will not be constitutional if it shall be ap-

parent that the object was not so much to secure the well-being of the citizens as to enable them to hold large amounts of property for their own aggrandizement and for other purposes than that of homesteads. *Id.*

5. ACTION OF STATE IN EXEMPTING PROPERTY AS HOMESTEAD WILL BE SUSTAINED AS CONSTITUTIONAL, although it may here and there work an individual hardship, so long as the extent of the homestead shall be in accordance with sound policy and humanity, and no greater than shall be reasonably necessary to protect the citizens in their pursuits necessary to their existence and well-being. *Id.*
6. PERSON RIGHTFULLY IN POSSESSION UNDER CONTRACT OF PURCHASE IS OWNER of the premises, within the meaning of the homestead law, and where he is the head of a family, residing with them upon the land and using and occupying it as a homestead, he has such a title as is protected from levy and sale. *Blue v. Blue*, 267.
7. UNLESS REQUIREMENTS OF STATUTE ARE OBSERVED IN MAKING LEVY AND SALE UNDER EXECUTION OF HOMESTEAD exceeding the amount allowed by law, the sale will be unauthorized; but a purchaser at such sale will acquire an equitable lien upon the surplus, which he may enforce as soon as the premises cease to be a homestead, and a purchaser from him will acquire this lien and may enforce it against the surplus. *Id.*
8. HUSBAND DOES NOT BY COMMITTING ADULTERY FORFEIT HIS RIGHT to claim the benefit of the homestead law. *Id.*
9. MONEY PAID FOR LAND BY THIRD PERSON DIRECTLY TO GRANTOR FOR GRANTEE IS PURCHASE-MONEY, AS AGAINST HOMESTEAD RIGHT of the grantee. *Austin v. Underwood*, 254.
10. DEED OF TRUST HAS PRECEDENCE OVER HOMESTEAD RIGHT, where it is substituted in place of a mortgage to secure the purchase-money. *Id.*
11. SALE UNDER DEED OF TRUST TO SECURE PURCHASE-MONEY OF HOMESTEAD PASSES TITLE TO PURCHASER, although the deed secures other indebtedness, if the homestead claimant does not pay or tender that portion which is purchase-money. *Id.*
12. DOCTRINE OF RELATION AS APPLIED TO NOTES GIVEN FOR PURCHASE-MONEY.—Where one purchases a piece of land with a dwelling-house thereon, and on the day of receiving his deed borrows money, which he applies in part payment therefor, and shortly afterwards, on the same day, executes a note for the money so borrowed, the note is to be regarded as relating back to the time of the actual loan, and as an existing debt at the time of the purchase. *Stevens v. Stevens*, 630.
13. HOMESTEAD CANNOT BE CLAIMED WHERE PURCHASE-MONEY IS UNPAID, WHEN.—If the purchaser of land with a dwelling-house thereon on the day of receiving his deed borrows money, which he applies in part payment therefor, and shortly afterwards, on the same day, executes a note for the money so borrowed, and judgment is subsequently recovered upon the note, and execution levied upon the premises, the tenant cannot claim a homestead therein as against the title acquired by the demandant under his levy. *Id.*
14. MORTGAGEE OF HOMESTEAD ACQUIRES NO RIGHT TO ENFORCE HIS MORTGAGE, in Illinois, if the mortgage, executed while the premises were occupied as a homestead, contains no waiver of the homestead, by reason of the fact that the premises are afterwards exchanged for other lands, and the owner leaves the premises, but they are subsequently reconveyed to him, and he returns thereto, on ascertaining that the title to the exchanged lands is defective. *Ives v. Mills*, 238.

15. **HOMESTEAD IS ABANDONED**, so as to be subject to sale under execution when the husband removes from the premises with his family to another state, where he resides for two years, and declares before leaving that if he liked the country, and could do well in his business, he would remain, but if not he would return, and after his return he declares that when he left he expected to remain, but found it to his interest to return. *Cabern v. Mulligan*, 247.
16. **ACTUAL RESIDENCE IS REQUISITE TO PROTECT HOMESTEAD FROM SALE UNDER EXECUTION**, as a general rule; although it is not essential under all circumstances. *Id.*
17. **IT IS EVIDENCE OF ABANDONMENT OF HOMESTEAD**, if the husband removes from the premises with his family to another state, where he remains for two years. *Id.*

See PARTITION, 4, 6.

HOMICIDE.

See CRIMINAL LAW, 1-12.

HUSBAND AND WIFE.

See DOWER; MARRIED WOMEN.

INDEMNITY.

See LOST INSTRUMENTS.

INFANCY.

1. **WHERE RATIFICATION OF INFANT'S DEED IS BY WRITTEN INSTRUMENT**, it is within the policy of the registry laws; if by acts *in pais*, then a subsequent purchaser must be affected with notice of such acts. *Black v. Hills*, 224.
2. **POSSESSION OF LAND BY GRANTEE OF INFANT IS NOTICE** of any acts of ratification. *Id.*

See VENDOR AND VENDEE.

INJUNCTIONS.

INJUNCTION TO PREVENT USE OF REGISTER OF VOTERS — POWER OF COURT. —

Where constitution provides that after the general assembly shall have passed an act of registration, and the same shall have been carried into effect, no person shall vote whose name does not appear on the register, and an act of the legislature provides that the judges of election shall not receive or deposit the ballot of any persons whose name does not appear thereon after such a law has been passed and has gone into effect, a petition for an injunction preventing the use of a register prepared for a certain county, and that the election be conducted as before the passage of the registration law, upon the ground that the officers of registration were not duly qualified, will not be granted, as, under the constitution, the court has no power to change the evidence of a voter's qualifications in one section of the state, and clothe the judges of election therein with powers not conferred by the legislature, but expressly taken away. *Hardisty v. Taft*, 584.

See EXECUTIONS, 8-11; NUISANCE; TRADE-MARKS.

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INSOLVENCY.

See JUDGMENTS, 2.

INTOXICATION.

See CRIMINAL LAW, 1, 3.

INTEREST.

USURY. — MONEY DUE FOR INTEREST may, by agreement, be changed into principal to bear interest in future, but not otherwise. Interest cannot be calculated on interest for several years in arrears. *Banks v. McClellan*, 594.

See BONDS; NEGOTIABLE INSTRUMENTS, 3.

INSURANCE.

ACKNOWLEDGMENT IN POLICY UNDER SEAL OF PAYMENT OF PREMIUM IS CONCLUSIVE, and the insurance company cannot show by parol that the premium was not in fact paid, but that a note was taken therefor, and the note not having been paid, the policy was void under a condition therein to the effect that where a note is taken for the premium the policy shall be void, unless the note is paid at maturity. *Illinois Central Ins. Co. v. Wolf*, 251.

JOINT DEBTORS.

SURVIVOR OF JOINT DEBTORS, WHO PAYS JOINT DEBT after expiration of time when the creditor could have enforced it against the administrator of the estate of the deceased, does not thereby become entitled to maintain a claim for contribution from such administrator, nor to avail himself thereof in set-off, in an action brought against him by such administrator. *Lovell v. Nelson*, 706.

JUDGMENTS.

1. **JUDGE CANNOT REFUSE RIGHT OF JUDGMENT** by default accorded by law to plaintiff. *State v. Posey*, 525.
2. **JUDGMENT CONFESSED BY INSOLVENT DEBTOR** in favor of a creditor, without his request or knowledge, and entered up at the instance of a debtor alone, and upon which execution is levied on the latter's property, to enable such creditor to obtain priority over other creditors, is null and void as to subsequent attaching creditors. *Wilcoxson v. Burton*, 66.
3. **JUDGMENT BASED UPON CONFESSION** in favor of a creditor, but without his knowledge or request, and entered up at the instance of the debtor alone, does not bar the creditor's right of action for the same debt, nor estop the debtor from denying any and all facts set out in such confession. *Id.*
4. **JUDGMENT WITHOUT PARTIES**, however perfect in form, is not attended with any of the consequences of a judgment, and is void. *Id.*
5. **JUDGMENT CONFESSED BY DEBTOR** in favor of a creditor, without his request or knowledge, may be thereafter ratified, and may become binding as between the parties by the creditors claiming under and attempting to enforce it. As between the parties it will be good from date of entry, but the ratification can neither overreach nor in any manner affect rights acquired prior to it and while the judgment was one only in name. *Id.*

6. JUDGMENT CONFESSED BY DEBTOR in favor of a creditor, without his request or knowledge, is void when confessed on a note given for more than is due the creditor, and for the purpose of defrauding other creditors. *Id.*
7. WHERE JUDGMENT IS CONFESSED BY DEBTOR in favor of a creditor on a note which is misdescribed in such judgment and in the statement upon which it is rendered, it is *prima facie* fraudulent, and the burden of rebutting such presumption is on the party claiming under the judgment. *Id.*
8. CONFESSION OF JUDGMENT BY DEBTOR merges no claims of the creditor except such as are included in it by some form of direct statement. *Id.*
9. WHEN JUDGMENT CONFESSED BY DEBTOR in favor of his creditor is sought to be set aside as fraudulent, the creditor cannot, in support of the judgment, prove a claim which the statement upon which the judgment was confessed not only does not include, but which it excludes by necessary intentment. He may, however, if he keeps within the limits of the terms used, prove all matters explanatory of the source of indebtedness. *Id.*
10. PARTY CANNOT RECOVER AGAINST ANOTHER JUDGMENT PAYABLE IN GOLD OR SILVER COIN, on the ground that the other received for him the sum sued for in that form, unless the kind of money received is specially averred in the complaint. *McComb v. Reed*, 115.
11. PAYMENT OF PART OF AMOUNT DUE ON MONEY JUDGMENT, under a contract that it shall operate as satisfaction in full, does not discharge the judgment. Such contract is *nudum pactum*. *Deland v. Hielt*, 102.
12. IN ACTION ON PROMISSORY NOTE, IF TRIAL IS HAD, the court may render judgment for the amount of the note and interest, and make the judgment bear the same rate of interest as the contract, although the complaint only prays for judgment for the face of the note. *Lane v. Gluckauf*, 121.
13. IF NOTE IS MADE PAYABLE IN ALTERNATIVE, EITHER IN GOLD OR LEGAL-TENDER NOTES, a judgment rendered on it may also be in the alternative. *Id.*
14. SUBSEQUENT PURCHASER OF LANDS IS CHARGEABLE WITH NOTICE OF DECREE IN CHANCERY by which the rights of a party to the lands are declared, and will hold them subject to such rights. Where, therefore, a tract of land held by a husband under a contract of purchase is set apart as alimony to his wife by a decree of divorce, a subsequent assignment of the contract by the husband and a conveyance from the original vendor to the assignee will not impair the rights of the wife; the grantee will hold nothing but the mere legal title, which he will in equity be bound to convey to her. *Blue v. Blue*, 267.
15. WHERE DECREE FOR ALIMONY ALLOTS PART OF TRACT OF LAND TO WIFE and the other part to the husband, and provides that, as between them, certain encumbrances upon the whole tract shall rest exclusively upon the husband's portion, if the wife, to protect her interests, discharges a portion of the encumbrance, she will have a lien upon the husband's portion to have the money paid by her refunded. But the payment by her of a small portion of the purchase-money of the land will not entitle her in equity to a conveyance to her of the whole tract. *Id.*
16. DECREE CANNOT AFFECT RIGHTS OF PERSONS NOT PARTIES to the suit in which it is rendered. *Id.*
17. IN ILLINOIS, ORAL TESTIMONY IN CHANCERY SUIT MAY BE PRESERVED BY RECTALS IN DECREE, if counsel prefer that method, and an appellate

court will no more question the statements in such recitals than it will those of a bill of exceptions in a common-law case. If a circuit judge inadvertently signs a decree containing erroneous recitals of the proof, he may correct it, even at a subsequent term. *Cooley v. Scarlett*, 298.

18. **FORMER RECOVERY IS PRIMA FACIE CONCLUSIVE BAR TO LATER SUIT**, where by the record of the former suit, filed with a plea of former recovery, it appeared that the issues joined in the former suit involved the questions presented in the later suit, but there were also other issues in the former suit which, if found for the same party, would have produced the same result; though the jury might decide such of the issues as were involved in the present case the other way. *Day v. Vallette*, 353.

See CONTEMPT; EXECUTIONS; HOMESTEADS, 1.

JURISDICTION.

1. **WHERE COURT HAS JURISDICTION OF PARTIES AND SUBJECT-MATTER**, acts performed and rights acquired by third persons under its judgment or decree, and while it remains in force, must be sustained, notwithstanding a subsequent reversal. *Goudy v. Hall*, 217.
2. **ACTION OF COURT, WHEN COLLATERALLY CALLED IN QUESTION**, will be referred either to its general or its statutory powers, as may be necessary to sustain its jurisdiction, and without reference to any such mere matter of form as the address of the petition. *Id.*
3. **JUDICIARY OF LOUISIANA IS NOT BY CONSTITUTION INVESTED WITH LEGISLATIVE POWERS**. It has no authority, by its rules, to deprive the citizen of his legal rights. *State v. Posey*, 525.
4. **JUDICIARY MUST CONFORM TO LAW AS IT STANDS**, and if the citizen desires relief from a statute which works an injury, or prevents a proper administration of justice, he must apply to the law-making power, and not to the courts. *Id.*
5. **SUMMONS SERVED BUT TWO DAYS BEFORE TRIAL, WHERE STATUTE REQUIRES THREE**, confers no jurisdiction of the person of the defendant, and a judgment rendered against him upon such a service is utterly void, and can be questioned at any time and in any proceeding, direct or collateral, and no title can be divested or transferred under such judgment. *Johnson v. Baker*, 293.

JURY AND JURORS.

- To **RENDER JUROR INCOMPETENT ON GROUND** of implied bias, it must appear that he entertains a fixed and settled conviction of the guilt or innocence of the defendant, or that he has expressed such a conviction. Whatever falls short of this does not amount to an unqualified opinion within the meaning of the statute. *People v. King*, 95.

LANDLORD AND TENANT.

1. **GENERAL RULE IS THAT TENANT UNDER FARMING LEASE** or contract has no right to remove from the premises so occupied any manure made in whole or in part from the produce of the land, without an express stipulation to that effect in the agreement. *Gallagher v. Shipley*, 611.
2. **WHERE LEASE IS GENERAL IN ITS PROVISIONS** and terms, and expresses nothing as to the mode in which the lessees are to use or occupy the premises, they are clothed with full power and right to occupy and use the land demised for any lawful purpose not injurious to the reversion. *Id.*

3. **STIPULATIONS CONTAINED IN LEASE** as to the condition in which the property is to be returned at the end of the term, but having no relation as to an intermediate occupation, raises no presumption as to the use to which the land is to be applied. *Id.*
4. **VERBAL AGREEMENT BETWEEN LANDLORD AND TENANT** cannot affect the rights of parties holding the demised premises under the lessee without notice of it. *Id.*
5. **RIGHT OF TENANT TO REMOVE MANURE.** — Where a lease is general in its terms, and says nothing of the mode in which the tenant is to use the demised premises, he may use them as a corral for cattle, and when such cattle are fed with supplies procured from sources foreign to the land, he may remove all manure made by them which is not commingled with the soil, provided he uses reasonable care and skill in removing the manure from the land so as to prevent injury thereto. *Id.*
6. **BREACH OF COVENANT IN LEASE NOT TO ASSIGN WITHOUT CONSENT OF LESSOR**, providing no penalty for the breach, and unconnected with other covenants providing a forfeiture in case of a breach, will not create a forfeiture by implication. *Burnes v. McCubbin*, 468.
7. **WHERE LEASE IS SILENT AS TO PLACE FOR PAYMENT OF RENT**, it will be presumed that the place intended was the place, or at least in the city, where the leased property is situated; and the tenant will not be expected to go out of the state to tender the rent. *Id.*
8. **SUFFICIENT COMPLIANCE WITH TERMS OF LEASE REQUIRING PAYMENT OF RENT WHEN DUE** is shown where it was tendered five days after it became due, and as soon as the lessor, who resided out of the state, and was accustomed to collect the rent, came to the city where the property was situated. *Id.*
9. **TENDER BY LESSEE BEFORE SUIT OF AMOUNT PAID BY LESSOR FOR TAXES** is in compliance with terms of a lease providing that the lessee shall pay all taxes, or refund any taxes paid by the lessor, and saves a forfeiture. *Id.*
10. **COVENANTS BY LESSEE TO PAY RENT, AND BY LESSOR TO MAKE IMPROVEMENTS AND REPAIRS**, without which the premises would be useless for the purposes leased, are mutual and dependent, and the lessor's failure to perform his covenant within a reasonable time, where no time is specified, justifies the lessee in abandoning the premises; but the lessee is liable for the rent for the time he occupied, less the damages sustained by him by reason of the improvements and repairs not having been made. *Lunn v. Gage*, 233.
11. **COVENANT BY LANDLORD TO MAKE IMPROVEMENTS AND REPAIRS SHOULD BE PERFORMED WITHIN REASONABLE TIME**, where no time is specified, and the tenant has entered. *Id.*

LOST INSTRUMENTS.

1. **IN ACTION UPON LOST NOTE, TENDER OF INDEMNITY BEFORE SUIT** is not absolutely necessary, but the better practice is to make such tender and allege the same in the complaint. A failure to do so is not fatal to the cause of action; it only affects the question of costs, and in other respects a tender at the trial is sufficient. *Randolph v. Harris*, 139.
2. **IN ACTION UPON LOST NOTE, IF NO TENDER OF INDEMNITY HAS BEEN MADE BEFORE SUIT**, the plaintiff is not entitled to costs unless the defendant has waived a tender, in which case the costs are in the discretion of the court. *Id.*

3. ON QUESTION OF INDEMNITY, NO DISTINCTION CAN BE MADE between a note which has been destroyed by fire or otherwise, and one which has been merely lost. *Id.*

LOST PROPERTY.

PROPRIETOR OF SHOP IS ENTITLED TO POSSESSION OF POCKET-BOOK which has been accidentally left by another upon a table there, and has remained uncalled for, as against a stranger who first sees it there. Property so left is not to be treated as other lost property, so as to entitle the finder to take and hold possession. *McAvoy v. Medina*, 733.

MANDAMUS.

1. MANDAMUS WILL NOT LIE WHERE STATUTE HAS EXPRESSLY PROVIDED ANOTHER ADEQUATE REMEDY. *Louisville etc. R. R. Co. v. State*, 358.
2. MANDAMUS WILL NOT LIE TO REVIEW ACTION OF COURT which is judicial and discretionary in its nature, but the remedy, if an error has been committed, is by appeal. *People v. Pratt*, 110.
3. MANDAMUS WILL NOT LIE TO COMPEL JUDGE TO ENTER JUDGMENT OF DISMISSAL upon plaintiff's motion, and at his costs, where the motion is resisted by defendant and denied by such judge; for in a case of this kind a judge acts judicially. *Id.*

MANSLAUGHTER.

See CRIMINAL LAW, 7.

MARRIAGE AND DIVORCE.

1. GENERALLY, DOMICILE OF WIFE IS DETERMINED BY THAT OF HUSBAND; but where there has been a final separation of husband and wife, and they have their actual permanent residence in different states, the domicile of the husband cannot be regarded as fixing that of the wife, so as to confer or oust the jurisdiction in a suit for divorce. *Jenness v. Jenness*, 335.
2. RESIDENCE OF DEFENDANT IN STATE IS NOT NECESSARY IN ACTION FOR DIVORCE in Indiana to enable him to file his cross-petition and obtain affirmative relief. *Id.*
3. DIVORCE IS VALID WHERE OBTAINED IN ILLINOIS by a citizen thereof from his wife, for the cause of desertion, upon notice to her by publication in a newspaper in the manner prescribed by the statutes of that state, although she was then living in Massachusetts under an agreement by which, after reciting their separation, he promised to pay her a certain weekly sum as long as she should remain single, and although she had no actual notice of his proceedings for a divorce, and was not in Illinois during the pendency thereof; and it is not competent for her, in a libel for divorce brought by her in Massachusetts, to offer evidence that he obtained the decree of divorce in Illinois by fraud and upon facts which would not entitle him to a divorce in Massachusetts. *Hood v. Hood*, 709.

See JUDGMENTS, 15.

MARRIED WOMEN.

1. MARRIED WOMAN IS ESTOPPED FROM ASSERTING HER TITLE to horse which belonged to her, and which her husband sold without her authority, if she was informed of the sale before payment was made, and had ample

- opportunity to give the purchaser notice of her rights, but failed to do so until after he had made payment to the husband. *Dann v. Cudney*, 755.
2. **MARRIED WOMAN SUING IN TROVER FOR HORSE SOLD BY HER HUSBAND** to the defendant, without her authority, may be asked on cross-examination as to her failure to give the purchaser notice of her rights, she having testified in chief that the horse belonged to her, and that she had never sold it nor authorized her husband to sell it. *Id.*
 3. **PROPERTY PURCHASED DURING COVERTURE WITH WIFE'S SEPARATE FUNDS** becomes her separate estate. *Ramsdell v. Fuller*, 103.
 4. **MORTGAGE BY GRANTEE OF HUSBAND, OF PROPERTY PURCHASED WITH WIFE'S SEPARATE FUNDS, and deeded to her during coverture, is a cloud upon her title, which a court of equity will relieve against.** *Id.*
 5. **PRESUMPTION IS THAT PROPERTY CONVEYED TO WIFE FOR MONEY CONSIDERATION** is common property, but this presumption may be rebutted by showing that it was purchased with money belonging to her separate estate. *Id.*
 6. **ONE PURCHASING FROM HUSBAND REAL ESTATE DEEDED TO WIFE** for a money consideration during coverture does so at his peril. The record of the deed is notice that the land may be the wife's separate property, and is sufficient to put purchasers upon inquiry. *Id.*
 7. **MORTGAGE BY WIFE OF HER SEPARATE PROPERTY TO SECURE HUSBAND'S DEBT, and in consideration of an extension of time for the payment thereof, is valid and enforceable against the property, if fairly obtained.** *Green v. Scrannage*, 447.
 8. **FALSE REPRESENTATIONS MADE TO WIFE BY HUSBAND, OR UNDUE INFLUENCE** exerted by him to induce her to execute a mortgage on her separate property to secure his debt, she having afterwards duly acknowledged it, will not affect the mortgagee or prejudice his security, if the husband's conduct was without the instigation, procurement, knowledge, or consent of the mortgagee. *Id.*
 9. **MORTGAGE BY WIFE OF HER SEPARATE PROPERTY TO SECURE HUSBAND'S DEBT IS INVALID** if she was induced to execute it from fear excited by threats made to her by the mortgagee of an illegal criminal prosecution against her husband. *Id.*
 10. **MORTGAGE BY WIFE OF HER SEPARATE PROPERTY TO SECURE HUSBAND'S DEBT IS VALID, though executed because of the mortgagee's threats of criminal prosecution against her husband, if the debt is just, and the criminal accusation was well founded, or upon reasonable grounds believed to be so by the mortgagee, and the wife freely and deliberately executed the mortgage, without undue influence by the mortgagee, unless the circumstances are such as render it illegal as an agreement to compound a felony.** *Id.*

See DOWER.

MASTER AND SERVANT.

1. **WHETHER RELATION OF MASTER AND SERVANT, OR PRINCIPAL AND AGENT, exists between defendants jointly prosecuted for a tort is a question of fact for the jury.** *Banfield v. Whipple*, 618.
2. **SUBCONTRACTOR FOR BUILDING BRIDGES FOR RAILROAD IS NOT CO-SERVANT** with those employed by it in managing its trains, so as to relieve the railroad from responsibility for injuries caused to the former through the negligence of the latter. *Donaldson v. Mississippi R. R. Co.*, 391.

3. MASTER IS LIABLE FOR TORTIOUS ACTS OF SERVANTS, done in his employment. *Id.*
4. MASTER IS LIABLE FOR TORTS OF HIS SERVANT DONE IN COURSE OF HIS EMPLOYMENT, though done without his authority, or even against his express directions. *Yates v. Squires*, 418.
5. RESPONSIBILITY OF MASTER FOR TORTS OF SERVANT GROWS OUT OF, is measured by, and begins and ends with his control of the servant; hence he is not liable for an act committed after the service is ended, no matter how soon after it is committed. *Id.*
6. MASTER CANNOT BE HELD LIABLE JOINTLY WITH HIS SERVANT for an injury done by the servant, in the master's absence, to a horse hired by the master; but this rule does not apply to the case of a horse hired by one person, intrusted by him to another, and injured by the immoderate driving of the second in the presence and with the assistance of the first. *Banfield v. Whipple*, 618.
7. AMONG COMMON LABORERS, RAILROAD COMPANY IS NOT LIABLE TO ANY ONE OF THEM for injuries resulting from the acts or omissions of any other one of the class, although each of the company's employees would be its agent as to strangers. *Louisville etc. R. R. Co. v. Collins*, 486.
8. SERVANT, BY ENTERING INTO HIS MASTER'S SERVICE, ASSUMES ALL RISKS OF THAT SERVICE which the master cannot control, including those arising from the negligence of his fellow-servants. Thus risks from the negligence of a switchman, like those from the negligence of the engineer and other servants in charge of a railroad train, come within the rule. *Gilman v. Eastern R. R. Corp.*, 635.
9. WHO ARE FELLOW-SERVANTS. — Where one servant is injured by the negligence of another, it is immaterial whether he who causes and he who sustains the injury are or are not engaged in the same or similar labor, or in positions of equal grade or authority. If they are acting together under one master in carrying out a common object, they are fellow-servants. Thus one who repairs cars and a switchman are fellow-servants. *Id.*
10. MASTER IS BOUND TO USE ORDINARY CARE IN PROVIDING SUITABLE STRUCTURES, engines, tools, and apparatus, and in selecting proper servants, and is liable to any of their fellow-servants for his negligence in these respects. And it makes no difference whether the master is an individual or a corporation; in either case, he is responsible to his servants for his own negligence, but not for that of their fellow-servants. *Id.*
11. RULE THAT MASTER IS NOT LIABLE FOR INJURIES TO SERVANT BY NEGLIGENCE OF FELLOW-SERVANT has been upheld in Massachusetts under a great variety of circumstances. See illustrations in this case. *Id.*
12. THAT MASTER WAS NEGLIGENT IN EMPLOYING HABITUAL DRUNKARD AS SWITCHMAN, thereby occasioning an accident, is a question for the jury. *Id.*
13. RAILROAD CORPORATION IS NOT LIABLE TO PERSON EMPLOYED BY IT TO REPAIR ITS CARS, for a personal injury arising from the negligence of a switchman in failing to properly adjust a switch upon the track over which he is carried by the corporation, free of charge, between his home and the place of his work, provided the company has used due care in the selection of the switchman. *Id.*
14. RAILROAD COMPANY IS LIABLE TO PERSON EMPLOYED BY IT TO REPAIR ITS CARS, for a personal injury arising from the negligence of a switchman in failing to perform his duty, where the switchman is an habitual drunk-

ard, and this fact was known, or ought to have been known, to the company, and the injury resulted from his intoxication. *Id.*

See COMMON CARRIERS, 17; CORPORATIONS, 6, 7; RAILROADS.

MILITARY LAW.

1. PLEA OF BELLIGERENT RIGHT WILL NOT JUSTIFY CAPTURE OR DESTRUCTION of such public property as court-houses, churches, and property of literary institutions, unless used for some military purpose by the captor's enemy. *Christian County Court v. Rankin*, 505.
2. SOLDIERS CANNOT JUSTIFY ACT NOT LEGITIMATELY ONE OF WAR by showing that they did it by command of their superior officers. *Id.*
3. IN WAR BETWEEN INDEPENDENT SOVEREIGNTIES, ABUSE OF BELLIGERENT POWER by soldiers in the service of their nation cannot be inquired into by the judiciary of the other, but this rule does not apply to a domestic war between the people of the same nation. *Id.*
4. KENTUCKY STATUTE, ACT OF 1864, PROVIDING "CIVIL REMEDY FOR INJURIES DONE BY DISLOYAL PERSONS," does not, so far as it applies to soldiers, intentionally or constitutionally extend to belligerent rights, but embraces only trespasses and spoliations committed by them in their own individual right and for their own benefit. *Id.*
5. ACTION FOR UNLAWFUL BURNING OF COURT-HOUSE may be maintained in the name of the county. *Id.*
6. CAPTURE OF TOWN IS NOT UNLAWFUL ACT IN MILITARY SENSE, but is allowable by the laws of war between antagonistic parties recognized as belligerents. *Witherspoon v. Farmers' Bank*, 503.
7. LIABILITY OF SOLDIER FOR WRONGFUL CAPTURE. — An officer in Morgan's Confederate army aided in the capture of a town, but neither counseled nor aided the robbery of a bank in the town by a portion of the command: *Held*, that he was not liable in damages to the bank for such robbery. *Id.*

MISTAKE.

GROSS MISTAKE AS TO QUANTITY, IN CONTRACT FOR SALE OF LAND, where the complaining party has not been guilty of any fraud or culpable negligence, nor has otherwise impaired the equity resulting from the mistake, will entitle him to relief whether the contract be executed or executory. *Solinger v. Jewett*, 372.

See DEEDS, 5.

MORTGAGES.

1. ASSIGNEE OF MORTGAGOR STANDING IN LEGAL PRIVACY with the mortgagor may avoid the contract for an excess of usury, and is entitled to the proper reduction on the mortgage, to enable him to perform his contract, and by payment to relieve the mortgaged premises from the encumbrance, in favor of a purchaser from the mortgagor. *Banks v. McClellan*, 594.
2. MORTGAGE OF LAND CONVEYS NO TITLE, LEGAL OR EQUITABLE, TO MORTGAGEE, but the title remains in the mortgagor until foreclosure and sale, and the mortgage is but a security in the nature of a specific lien for the debt. *Ladue v. Detroit etc. R. R. Co.*, 759.
3. MORTGAGE TO SECURE FUTURE ADVANCES WHICH IT IS OPTIONAL WITH MORTGAGEE to make or not is not effectual as an encumbrance until the advances are made, and constitutes no lien for advances made after the mortgagor has conveyed the property and the deed has been recorded. *Id.*

4. RECORD OF MORTGAGE TO SECURE FUTURE ADVANCES WHICH ARE OPTIONAL WITH MORTGAGEE puts a purchaser from the mortgagor upon notice only as to such advances as are made before the record of his deed. *Id.*
 5. MORTGAGE INSTRUMENT WITHOUT ANY DEBT, LIABILITY, OR OBLIGATION SECURED BY IT can have no present legal effect as a mortgage or encumbrance upon the land; and the mere recording of the instrument cannot make it such, nor have any greater effect than to put a purchaser or encumbrancer upon inquiry as to whether an advance has been made or a liability incurred for which it may stand as security. *Id.*
 6. RECORD OF DEED FROM MORTGAGOR OF MORTGAGE TO SECURE FUTURE ADVANCES which are optional with the mortgagee is sufficient notice to the latter not to incur further liabilities on the faith of the mortgage, and the purchaser is under no obligation to give the mortgagee actual notice of his deed. *Id.*
 7. ASSIGNEE OF EQUITY OF REDEMPTION in mortgage tainted with usury is entitled to the aid of equity to redeem by proffering to pay the mortgage debt and simple interest thereon, or by bringing the same into court to be paid to the mortgagee. *Banks v. McClellan*, 594.
 8. WHERE MORTGAGOR HAS ASSIGNED ALL HIS INTERESTS in the mortgaged property, he is a competent witness for the assignee to show the true amount due on the mortgage. *Id.*
 9. WHERE SUBJECT-MATTER OF MORTGAGE IS NOT UNMIXED CHOSSES IN ACTION for the payment of money, the assignee of the mortgagor may maintain a suit in equity in his own name for an accounting of the amount due on the mortgage, and to reduce the same on the ground of usury. *Id.*
 10. ASSIGNEE OF MORTGAGOR'S RIGHTS, although the latter has conveyed absolutely, if the transaction was intended merely as security for a loan, can resort to equity for a decree declaring the conveyance a mortgage, and directing the reconveyance of the property, upon payment of the amount properly due, or if the property has passed beyond the assignee's reach, and the mortgage is overpaid, the court may order an account and repayment of the difference. *Aliter*, when the conveyance is absolute and excludes all idea of a loan and security. *Id.*
- See DOWER, 2; EXEMPTIONS, 6; FIXTURES; HOMESTEADS, 14; MARRIED WOMEN, 4, 7-10; RAILROADS; USURY.

MUNICIPAL CORPORATIONS.

See CORPORATIONS, 8-29

MURDER.

See CRIMINAL LAW, 1-12

NAVIGABLE WATERS.

See HIGHWAYS.

NEGLIGENCE.

1. IN ORDER TO MAINTAIN ACTION FOR INJURY TO PERSON OR PROPERTY BY REASON OF NEGLIGENCE OR WANT OF DUE CARE, there must be shown to exist some obligation or duty towards the plaintiff, which the defendant has left undischarged or unfulfilled. This is the basis on which the cause of action rests. *Sweeney v. Old Colony etc. R. R. Co.*, 644.

2. **OWNER OF LAND IS NOT BOUND TO PROTECT OR PROVIDE SAFEGUARDS FOR WRONG-DOERS.** So a trespasser or licensee who enters on premises by permission only, without any enticement, allurement, or inducement being held out to him by the owner or occupant, cannot recover damages for injuries caused by obstructions or pitfalls. *Id.*
3. **OWNER'S LIABILITY FOR INJURIES TO PERSONS COMING ON HIS PREMISES.** — A mere passive acquiescence by an owner or occupier in a certain use of his land by others involves no liability; but if he directly or by implication induces persons to enter on and pass over his premises, he thereby assumes an obligation that they are in a safe condition, suitable for such use, and for a breach of this obligation he is liable in damages to a person injured thereby. *Id.*
4. **RAILROAD COMPANY'S LIABILITY FOR INJURIES TO PERSONS ATTEMPTING TO CROSS ITS TRACK AT PRIVATE CROSSING.** — Where a railroad company have made a private crossing over their track, in a city, allowed the public to use it as a highway, and stationed a flagman there to prevent persons from undertaking to cross when there is danger, they are liable in damages to one who, using due care, is induced to undertake to cross by a signal from the flagman that it is safe, and who is injured by a collision which occurs through the flagman's carelessness. The case comes within that class in which parties have been held liable in damages by reason of having held out an invitation or inducement to persons to enter upon and pass over their premises. *Id.*
5. **FLAGMAN CHARGED WITH DUTY OF PROTECTING PUBLIC,** at a place constructed and used as a public way by great numbers of people, such as a private railroad crossing in a city, is bound to indicate to persons when it is safe for them to pass as well as when it is necessary or prudent for them to refrain from passing. *Id.*
6. **PARTY'S LIABILITY FOR NEGLIGENCE IN PERFORMANCE OF DUTY VOLUNTARILY ASSUMED, AND NOT IMPOSED BY RULES OF LAW.** — If a person undertakes to do an act or discharge a duty by which the conduct of others may properly be regulated and governed, he is bound to perform it in such manner that those who are rightfully led to a course of conduct or action on the faith that the act or duty will be properly performed, shall not suffer loss or injury by reason of his negligence. The liability in such cases does not depend on the motives or considerations which induced a party to take on himself a particular task or duty, but on the question whether the legal rights of others have been violated by the mode in which the charge assumed has been performed. *Id.*
7. **OWNER'S LIABILITY TO ONE FALLING THROUGH OPEN TRAP-DOOR ON FORMER'S PREMISES AND INJURING HIMSELF.** — Where a store has two entrances, with a trap-door between one of them and the stairs leading to the upper stories, which are verbally leased to a tenant with permission to use such entrance, the owners occupying the lower stories are bound to use the trap-door with reference to the safety of those who have a right to use the entry where it is; and if they are negligent in exercising suitable and reasonable precautions to guard against accident while the trap-door is open, they are liable in damages to a person having lawful occasion to pass to or from the upper rooms, who, while using due care, falls through the trap-door and sustains an injury. *Elliott v. Pray*, 653.
8. **A IS LIABLE FOR INJURIES TO B OCCASIONED BY FALLING THROUGH OPEN TRAP-DOOR ON A'S PREMISES,** where B has been induced to enter for a lawful purpose and under belief that they were in safe condition.

Where the owners of the upper stories of a store situated on a public street have let them to a tenant, and an entrance directly in front of the stairs leading to the upper stories is so constructed and is so habitually kept open as to indicate that it is a proper entrance for those who have occasion to use the stairs, and there is a trap-door between it and the stairs, which they negligently and carelessly leave open, they are liable in damages to one who, while using due care, and having lawful occasion to use the stairs, is thereby induced to pass through such entrance, and sustains an injury by falling through the trap-door therein. *Id.*

9. **OWNER OF FACTORY IS NOT LIABLE TO PERSON WHO COMES UPON HIS PREMISES** and injures himself by falling through a trap-door in a portion of the factory not open to the public, and intended exclusively for workmen, where the owner has held out no invitation or allurement, express or implied, for him to enter. *Zoebisch v. Tarbell*, 660.
10. **PLAINTIFF MUST PROVE THAT HE USED DUE CARE TO AVOID COLLISION** by which he was injured, in order to recover damages of a railroad company for a personal injury sustained thereby through their negligence. Their negligence would not authorize him to maintain an action if he was also negligent. *Butterfield v. Western R. R. Corp.*, 678.
11. **"DUE CARE" MEANS REASONABLE CARE** adapted to the circumstances of the case. *Id.*
12. **FAILURE TO USE ONE'S SENSES WITHOUT REASONABLE EXCUSE IS FAILURE TO USE "REASONABLE CARE."** Thus, the crossing of a place known to be so dangerous as a railroad track frequently is, by reason of the passing trains, reasonably requires a high degree of watchfulness and attention; and before attempting to cross, a man should make a reasonable use of his sense of sight as well as of hearing, in order to ascertain whether he will expose himself to a collision. *Id.*
13. **MERE SCINTILLA OF EVIDENCE IS NOT SUFFICIENT TO AUTHORIZE JUDGE TO SUBMIT QUESTION** of plaintiff's use of due care to jury, or to submit the question of the defendant's negligence to them. There must be evidence upon which a jury may reasonably and properly infer that plaintiff used ordinary care, or that there was negligence on the part of defendant. *Id.*
14. **NEGLIGENCE SUFFICIENT TO WITHDRAW CASE FROM JURY.** — Plaintiff's neglect to use his eyes shows such want of due care on his part, and such palpable negligence, that the court will be authorized, in an action by him to recover damages for an injury sustained by him from a collision with a passing train, to instruct the jury that he is not entitled to a verdict, where his own testimony shows that, while traveling upon a highway, in a dark and stormy night, toward a railroad crossing, in a level country, and being well acquainted with the highway and railroad, knowing that he was near the crossing, and that a train would soon pass, he attempted to cross the railroad without looking to see whether a train was coming, and where, if he had looked, he would have seen the train, for the engine had a head-light. The fact that he had to obstruct his sight to prevent his hat from being blown away, and that he relied upon his hearing, would not excuse him, though the bell was not rung nor the whistle sounded. *Id.*
15. **PLAINTIFF MUST PROVE DUE CARE ON HIS OWN PART** in order to maintain an action to recover damages for a personal injury caused by the negligence of another. *Gilman v. Eastern R. R. Corp.*, 635.
16. **CASE INVOLVING DUE CARE ON PART OF PLAINTIFF SHOULD BE WITHDRAWN FROM CONSIDERATION OF JURY ONLY WHEN** there is an entire

- absence of any facts to authorize the inference that the plaintiff was conducting himself with reasonable prudence and discretion, or the undisputed facts of the case prove actual negligence. *Fox v. Sackett*, 682.
17. QUESTION AS TO PLAINTIFF'S USE OF DUE CARE SHOULD BE SUBMITTED TO JURY where, in an action to recover damages for an injury sustained from a collision with a wagon left standing by the defendant in a highway, the evidence shows that the plaintiff was accustomed to drive horses, and that the accident happened while he was driving a gentle horse in a dark night, on a slow trot, looking out on one side of the horse for a blanket which he had lost shortly before from his wagon, while his companion was looking for the blanket on the other side, and neither of them saw the defendant's wagon before the collision, though the plaintiff had seen the obstruction there on the day of the accident. He had a right to suppose that the unlawful obstruction would have been removed before nightfall; and it cannot be held as a matter of law that he was so careless as to preclude his recovery. *Id.*
 18. EVIDENCE OF DUE CARE SUFFICIENT TO BE SUBMITTED TO JURY. — On a bill of exceptions an appellate court will hold that the riding of a safe and gentle horse on a dark night, by one who understands how to manage a horse, over a familiar road, and turning out upon meeting a carriage, shows reasonable care, where an action is brought to recover for an injury sustained by reason of a defective highway. *Stevens v. Inhabitants of Boxford*, 616.
 19. CORRECT INSTRUCTIONS IN ACTION AGAINST TOWN TO RECOVER FOR PERSONAL INJURIES SUSTAINED BY PLAINTIFF WHILE RIDING ON HORSEBACK UPON HIGHWAY, BY GOING OFF FROM BANK WHERE THERE WAS NO RAILING. — The defendants, in such case, have no ground of exception, where the jury are instructed, according to defendants' request, that "if the horse passed the bank wall in safety, and while proceeding in the adjoining field, stepped on ice and slipped down and thus injured the plaintiff, he could not recover," though the judge adds, after giving such requested instruction, that "if the horse, by the reason of a want of a railing, went over the bank wall, and immediately, and while under the same impulse or impetus, slipped on ice in the field and fell, thereby injuring the plaintiff, the town would be liable." The want of a railing in such case is a defect which must be regarded as the proximate cause of the injury. *Id.*
 20. VERDICT FOR PLAINTIFF IN ACTION FOR NEGLIGENCE WILL NOT BE SET ASIDE by the supreme court, where the evidence in the case is conflicting, and is properly submitted to the jury under such instructions as could not have prejudiced the defendant. *Donaldson v. Mississippi etc. R. R. Co.*, 391.
 21. THAT DECEASED WAS RIGHTFULLY AND NOT NEGLIGENCELY OR IMPROPERLY ON TRACK MUST BE SHOWN BY PLAINTIFF, either by direct testimony, or by presumption from facts and circumstances proved, in an action against the railroad company to recover damages for negligently running over and killing the deceased. *Id.*
 22. IN CASE OF CONFLICTING EVIDENCE, ON QUESTION OF NEGLIGENCE, the jury have a right to decide the character of the negligence. *Louisville etc. R. R. Co. v. Collins*, 486.
 23. CO-OPERATING NEGLIGENCE OF PLAINTIFF, SUING FOR INJURY RESULTING FROM GROSS NEGLIGENCE of the defendant, will not exonerate the latter if, by the exercise of proper care on his part, the injury might have been avoided. *Id.*

24. THAT NEGLIGENCE OR TRESPASS OF THIRD PERSON CONTRIBUTED TO INJURY is no defense to an action by a passenger against a carrier to recover damages for an injury sustained through the carrier's negligence, although such third party acted entirely independently of the carrier. *Baton v. Boston etc. R. R. Co.*, 730.
25. WHETHER FAILURE OF SERVANTS OF RAILROAD COMPANY, IN CHARGE OF TRAIN which is stopped by an obstruction upon the track, to notify passengers to leave the cars, where a possible collision might be anticipated, is a neglect of duty, is a question for the jury upon all the evidence. *Id.*
26. NO PRESUMPTION OF NEGLIGENCE ON PART OF DEFENDANT IS RAISED BY PROOF MERELY OF DUE CARE on the part of plaintiff, and of the injury, in an action against a ferry company to recover damages for injury sustained by its negligence in failing to provide a safe and sufficient means of passage from its boat; nor will such proof shift the burden which rests upon the plaintiff to prove defendants' negligence; but all the evidence may be taken into consideration by the jury, and allowed such weight as they think reasonable. *Le Barron v. East Boston Ferry Co.*, 717.
27. CORPORATION IS RESPONSIBLE FOR NEGLIGENCE OF ITS EMPLOYEES OR AGENTS. *Illinois Central R. R. Co. v. Read*, 260.
28. AGREEMENT EXEMPTING RAILROAD COMPANY FROM LIABILITY FOR ANY INJURY TO PERSON OR PROPERTY OF FREE PASSENGER IS VALID, so far as the consequences of its ordinary negligence are concerned, but not as regards its gross negligence, recklessness, or willful misfeasance. *Id.*
29. ACCEPTANCE AND USE OF FREE TICKET ESTABLISHES AS AGREEMENT INDORSEMENT THEREON to the effect that the railroad company will not be liable for any injury to the person or property of the passenger, so far as it is consistent with the rules of public policy. *Id.*

See COMMON CARRIERS; DAMAGES, 6, 7; EVIDENCE, 1; MASTER AND SERVANT.

NEGOTIABLE INSTRUMENTS.

1. IN CONNECTICUT, INDORSEMENT IN BLANK OF EITHER NEGOTIABLE OR NON-NEGOTIABLE NOTE BY ONE NOT PARTY TO IT implies a warranty that the note when due will, by the use of due diligence, be collectible. But such an indorsement is only *prima facie* evidence of what the contract was between such an indorser and the holder of the note, and will yield to proof of the real character of the contract. Notes so indorsed have none of the sanctity of ordinary negotiable paper, and any one taking them is put upon inquiry as to the real nature of the contract. *Riddle v. Stevens*, 181.
2. WHERE BLANK NOTE IS INDORSED BY ONE WHO SUPPOSED THAT HIS NAME WOULD BE INSERTED AS PAYEE, upon an understanding with the maker that it should be used for a particular purpose, and the maker, without the indorser's knowledge, fills it up by inserting the name of another person as payee, who thereupon takes the note, without any knowledge of the facts, for a valuable consideration, but for a different purpose from that intended by the indorser, such payee cannot recover thereon against the indorser. *Id.*
3. MAKER OF NOTE IS ENTITLED TO CREDIT FOR USURIOUS INTEREST PREVIOUSLY PAID BY HIM, as against the payee or an indorsee who did not take the note for a valuable consideration, where the note represents the balance on a loan originally made at a usurious rate of interest, the payments in the mean time having been applied first on the usurious interest and then on the principal. *Saylor v. Daniels*, 250.

4. **INDORSEER OF NOTE AS COLLATERAL SECURITY FOR PRE-EXISTING DEBT IS HOLDER FOR VALUABLE CONSIDERATION**, but only to the extent of such debt. *Id.*
5. **SECOND TRANSFERREE OF PROMISSORY NOTE CANNOT MAINTAIN ACTION AGAINST PAYEE**, except by virtue of a contract of indorsement. *Watson v. Chesire*, 382.
6. **SECOND TRANSFERREE OF PROMISSORY NOTE CANNOT MAINTAIN ACTION AGAINST PAYEE** for the payee's fraud in the transfer of the note to the first transferee. *Id.*
7. **TRANSFERER OF PROMISSORY NOTE WITHOUT RECOURSE IS EXEMPT FROM ORDINARY RESPONSIBILITIES OF INDORSER**; but unless otherwise agreed, he impliedly warrants that the paper is genuine, that it is of the kind or description it purports to be, that the parties to it are *sui juris* and capable of contracting, that it has not been paid, and that he has done nothing and will do nothing to prevent the transferee from collecting it; and he is liable for any fraud practiced by him in the transfer. *Id.*
8. **TRANSFERER OF PROMISSORY NOTE WITHOUT RECOURSE IS NOT LIABLE ON PAPER TRANSFERRED**, in the cases where an action can be maintained against him, but for the original consideration or its value, or for the fraud practiced. *Id.*
9. **INDORSEMENT OF PROMISSORY NOTE WITHOUT RECOURSE TRANSFERS TITLE TO NOTE**, but not the right to maintain an action for fraud practiced upon such indorser in the transfer of the note to him by the payee. *Id.*
10. **INSTRUCTION TO JURY IS PROPER, IN ACTION FOR FRAUDULENT REPRESENTATIONS IN TRANSFER OF PROMISSORY NOTE** by indorsers without recourse, that if the defendants, or either of them, fraudulently suppressed or withheld facts material to be known, this would be, in law, a fraud, and actionable, if any injury to the plaintiff resulted therefrom. *Id.*
11. **ADDITION OF ANOTHER MAKER TO NOTE AT INSTANCE OF PAYEE**, and without the knowledge of the other makers, after the note is completed and delivered, operates to discharge the other makers. *Hall v. McHenry*, 451.
12. **ADDITION OF ANOTHER MAKER TO NOTE BEFORE ITS COMPLETION AND DELIVERY** will not discharge original makers, if made without the knowledge of the payee, *semble*. *Id.*
13. **SURETY ON NOTE IS DISCHARGED FROM LIABILITY BY ADDITION OF ANOTHER SURETY** without his consent, though before the delivery of the note, if the payee knew that the addition was made without his consent. *Id.*
14. **CUTTING OFF NAME OF ONE SURETY WITHOUT CONSENT OF OTHER SURETY** by payee is such an alteration of a note as will discharge the latter surety from liability thereon. *Id.*
15. **WHERE COMMERCIAL PAPER IS RECEIVED IN PAYMENT AND EXTINGUISHMENT OF PRE-EXISTING DEBT**, the holder is entitled to protection. *McKnight v. Knisely*, 364.
16. **ACCEPTANCE OF NEGOTIABLE PAPER IS PRIMA FACIE EVIDENCE OF PAYMENT** of the account for which it is given. *Paine v. Duinel*, 533.
17. **PRESUMPTION OF PAYMENT IS REBUTTED** when negotiable paper is taken under a misapprehension of the rights of the parties. *Id.*
18. **LAW IMPLIES, ON SIMPLE ASSIGNMENT OF PROMISSORY NOTE, PROMISE** by assignor to refund the consideration of the assignment if the note be not justly demandable, or if by the obligor's insolvency or removal from the jurisdiction within which he resided at the date of the assign-

ment, the assignee, by ordinary diligence, cannot coerce payment. *Cross v. Tilford*, 483.

19. WHEN PRESENTATION AND SUIT ON NOTE BY ASSIGNEE THEREOF ARE PREVENTED by non-intercourse resulting from war, on maturity of the note, and the war continuing, the assignee may bring action against his assignor upon the assignment. *Id.*

See BANKS AND BANKING; CORPORATIONS, 3, 5; JUDGMENTS, 12, 13; LOST INSTRUMENTS.

NOTICE

PARTY PURCHASING AS REDEMPTING CREDITOR IS DEEMED TO HAVE HAD NOTICE of the records and proceedings of the court that rendered the judgment under which the sale that he redeems from was made, and if such records on examination would show that such judgment was void, because the court had not jurisdiction to render it, it is his neglect not to have made the examination, and he will be held as much responsible for the consequences as if he had made the examination and had actual notice. *Johnson v. Baker*, 293.

NUISANCE

1. NUISANCE MAY BE PRODUCED BY OFFENSIVE SOUNDS in the prosecution of a business lawful *per se*. *Bishop v. Banks*, 197.
2. BLEATING OF CALVES KEPT OVER NIGHT AT SLAUGHTER-HOUSE, to be slaughtered the next day, to the great annoyance of a family living near, is a nuisance, and will be enjoined. *Id.*
3. PRODUCTION OF OFFENSIVE SMELLS FROM OFFAL OF SLAUGHTERED ANIMALS is a nuisance, and will be enjoined. *Id.*

OFFICE AND OFFICERS.

1. OFFICER MUST SHOW THAT HE IS OFFICER DE JURE, AND NOT DE FACTO, TO DEFEND HIMSELF against an action brought against him by one who has been injured by his official acts. As to third persons, however, it is sufficient to show that he is an officer *de facto*. *Hardesty v. Taft*, 584.
2. BILL ASKING THAT ACTS OF OFFICER BE DECLARED INVALID BECAUSE AT TIME OF THEIR PERFORMANCE OFFICER HELD ANOTHER OFFICE of profit under the government, in violation of the constitution, must be supported distinctly by the proofs exhibited with the bill. The bill should show, also, that at the time of the performance of the acts claimed to be invalid, the officer was also in office under the other appointment. *Id.*
3. WHERE OFFICER IS CHARGED WITH HAVING HELD TWO OFFICES OF PROFIT UNDER GOVERNMENT AT SAME TIME, in the absence of a specific allegation to the contrary, a presumption might fairly be indulged in favor of the continuance of government, that, if the offices were in conflict, the resignation of the one alleged to be the constitutional barrier to the other had previously taken place. *Id.*
4. COURT OF EQUITY HAS NO JURISDICTION TO PREVENT PERFORMANCE OF POLITICAL DUTIES like those committed to officers of registration. *Id.*
5. WILLFUL, FRAUDULENT, OR CORRUPT REFUSAL OF VOTE BY JUDGES OF ELECTION, OR LIKE DENIAL OF REGISTRATION by the officers appointed to register voters, can be adequately compensated for in damages at law, and equity will consequently refuse to interfere in such matters. *Id.*

See ELECTIONS, 2.

PARDONS.

PARDON OF PRESIDENT OF UNITED STATES RELIEVES RECIPIENT FROM ALL DISABILITY OR RESPONSIBILITY on account of the commission of the offense for which he was pardoned. This principle applied to the President's proclamation of pardon and amnesty of May 29, 1865. *Rison v. Farr*, 52.

PARENT AND CHILD.

See **COMMON CARRIERS**, 16, 17; **DAMAGES**, 8.

PARTITION.

1. **COMPLAINT IN PARTITION IS GOOD** which contains only general allegations that the premises cannot be divided by metes and bounds without prejudice, and does not state the facts showing why such partition cannot be made. *De Uprey v. De Uprey*, 81.
2. **COMPLAINT IN PARTITION IS GOOD** which is silent as to the particular mode of partition sought. *Id.*
3. **WHETHER PARTITION CAN OR CANNOT BE MADE** by metes and bounds is the only necessary averment in a complaint for partition, as that is purely a question of fact and the ultimate fact to be found. The constituent facts, or those which lie behind, are probative, and need not be averred. *Id.*
4. **IN ACTION FOR PARTITION** where the wife claims a homestead right or an interest in the premises, she is not only a proper but a necessary party to the proceedings. *Id.*
5. **ALL PARTIES HAVING OR CLAIMING ANY INTEREST** in the land are not only proper but necessary parties to a suit in partition. *Id.*
6. **WHERE PARTY SUED IN PARTITION** disclaims, in his answer, all interest in the land, except a homestead interest held by himself and wife, such disclaimer is not sufficient to entitle him to a dismissal of the action. *Id.*
7. **IN ACTION FOR PARTITION**, defendant cannot defeat the action, nor is he entitled to have it dismissed, by the mere force and effect of his answer, no matter what it contains. *Id.*
8. **IN ACTION FOR PARTITION**, any question affecting the right of the plaintiff, or the rights of each and all of the parties in the land, may be put in issue, tried, and determined in the action. *Id.*
9. **IN ACTION FOR PARTITION**, where the complaint alleges that the parties are co-tenants, the findings of the court must correspond with the allegations of the complaint only so far as to show that the parties hold and are in possession of the land as joint tenants or as tenants in common, and that one or more of them has an estate of inheritance, or for life or lives, or for years. Partition may be had, although either of the parties may have set forth his interests incorrectly. *Id.*

See **ADVERSE POSSESSION**, 6; **DOWER**, 2; **CO-TENANCY**.

PAYMENTS.

1. **PAYMENT OF MONEY IS COMPULSORY WHEN MADE THROUGH NECESSITY** to obtain possession of goods illegally withheld, where the detention is fraught with great immediate hardship or irreparable injury, and the money paid may be recovered back in an action of *assumpsit*. *Cobb v. Charter*, 178.
2. **WHERE PERSON DETAINS ANOTHER'S CHEST OF TOOLS AND IMPLEMENTS OF TRADE**, necessary for upholding life, until they are redeemed by the pay-
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ment of money to which he had no shadow of right, the money so paid may be recovered back without making any demand therefor. *Id.*

3. WHERE PERSON HAVING POSSESSION OF ANOTHER'S CHEST OF TOOLS REFUSES TO DELIVER THEM to the owner on demand, except upon his paying, without any obligation, the debt of another person, and the owner thereupon leaves money with a third person to be paid when the chest should be sent to the owner, which money is accordingly paid by such third person after the goods are so sent, there is a sufficient demand for the chest to maintain an action for the recovery back of the money so paid. *Id.*

See NEGOTIABLE INSTRUMENTS, 15-17.

PLEADING AND PRACTICE.

1. PERSON HAVING NO INTEREST IN PROCEEDING NEED NOT BE MADE PARTY THERETO. *Cooley v. Scarlett*, 298.
2. PLEA BAD IN PART IS BAD FOR WHOLE, WHERE PLEA IS ENTIRE. *Rison v. Farr*, 52.
3. EACH PARAGRAPH OF COMPLAINT MUST CONTAIN IN ITSELF SUFFICIENT AVERMENTS to constitute a good cause of action. *Day v. Vallette*, 353.
4. WHERE FIRST COUNT OF DECLARATION FOR RECOVERY BACK OF MONEY ILLEGALLY EXTORTED IS SUFFICIENT, and a second count, inartificially drawn and containing superfluous averments, but fully stating the circumstances out of which the law implies a promise by the defendant to pay the plaintiff's demand, is added, the defect in form is not sufficient to invalidate the declaration. *Cobb v. Charter*, 178.
5. COMMON COUNTS FOR GOODS SOLD AND DELIVERED, WORK AND LABOR DONE, money had and received, etc., are sufficient under the code, as they were under the practice before the code; and if the opposing party objects to this form of pleading, he may under the code move to have it made more specific. *Meagher v. Morgan*, 476.
6. ANY OBJECTIONS TO COMMON COUNTS UNDER CODE ON ACCOUNT OF INDEFINITENESS or uncertainty are waived by proceeding to trial. *Id.*
7. COMMON COUNTS MAY BE PLEADED IN COUNTERCLAIM UNDER CODE. *Id.*
8. DEFECT IN PETITION WHICH SHOULD BE ASSAILED BY DEMURRER IS CURED BY VERDICT. *Crossen v. White*, 420.
9. OBJECTIONS TO ADMISSION OF EVIDENCE NOT TAKEN IN LOWER COURT cannot be raised on appeal. *Id.*
10. WHERE DEFENSE MUST BE SPECIALLY PLEADED, OMISSION TO PLEAD IT is not cured by the introduction, without objection, of evidence in support of it, and the finding of the facts in relation to it by the court. *McComb v. Reed*, 115.
11. WHERE THERE ARE NO FINDINGS OF FACT IN CASE, it must be presumed on appeal that all the issues of fact raised by the answer were found in favor of the party recovering judgment. *Buckout v. Swift*, 90.
12. AVERMENTS IN COMPLAINT NOT DENIED must be taken to be true. *Id.*
13. EVIDENCE IN CHIEF MAY BE INTRODUCED AFTER PARTIES HAVE RESTED, IN DISCRETION OF COURT, and this discretion will only be reviewed by the supreme court in case of manifest abuse. *Donaldson v. Mississippi etc. R. R. Co.*, 391.
14. WEIGHT OF EVIDENCE UNDER CALIFORNIA CONSTITUTION is left entirely to the jury, and the court is not allowed to express an opinion in relation thereto, although it may state what facts are in evidence and what are not. *People v. King*, 95.

15. COURT MAY STATE TESTIMONY and declare the law, although it is erroneous to charge in respect to matters of fact. *Id.*
16. INSTRUCTIONS OF LOWER COURT WILL BE PRESUMED to have been correct, in the absence of any statement or bill of exceptions on appeal embodying the evidence or declaring its purport or tendency, so far as is necessary to point the exception, unless such instructions are manifestly erroneous under any and every conceivable state of facts. *Id.*
17. JUDGE IS NOT BOUND TO ADOPT LANGUAGE OF COUNSEL IN GIVING LAW OF CASE TO JURY, and if it appears or may fairly be presumed from the exceptions that pertinent and correct instructions as to the points raised by the testimony were in fact given, exceptions will not be sustained on account of his refusal to do so. *Tainter v. Lombard*, 552.
18. INSTRUCTION WILL NOT BE PRONOUNCED ERRONEOUS, AS TENDING TO MISLEAD JURY, where the record does not purport to give the whole of it, notwithstanding the portion given is misleading. *Dann v. Cudney*, 755.
19. OMISSION IN INSTRUCTION which inures to the advantage of appellant cannot be urged by him on appeal. *State v. Baltimore etc. R. R. Co.*, 600.
20. REQUESTED INSTRUCTIONS ARE PROPERLY REFUSED, when they call upon the court to take from the jury the determination of facts, or when the case does not show the facts to which the requested instructions relate. *Brackett v. Persons Unknown*, 548.
21. WHEN EVIDENCE IS CONFLICTING, NEW TRIAL WILL NOT BE GRANTED on the ground that the findings are without evidence to support them. *Wilcoxon v. Burton*, 66.
22. REFUSAL OF JUDGE TO MAKE SPECIAL INQUIRY OF JURY, on the morning after they had rendered their verdict, and after their separation, as to their finding upon a particular point, constitutes no ground of exception, because the inquiry would be too late. These inquiries are always made when the jury render their verdict, and before they separate. *Green v. Clay*, 622.
23. WHERE DEED USED AS EVIDENCE IS NOT CONTAINED IN TRANSCRIPT, and the clerk certifies that it is not on file in the court below, this court will presume in the absence of the deed that the rulings of the circuit court with regard to it were correct. *Gent v. Lynch*, 558.
24. VERDICT RENDERED IN PLAIN AND DEFLANT OPPOSITION TO ALL EVIDENCE ought instantly to be set aside. *Crossley v. O'Brien*, 329.
25. VERDICT IS SO FAR OPPOSED TO EVIDENCE AS TO JUSTIFY NEW TRIAL, where in a trial in an action of ejectment, upon a question of boundary, the testimony of five unimpeached witnesses stood opposed to the description contained in a deed to which one of the parties was a stranger, and the verdict found the fact as recited in the deed. *Franklin v. Dorland*, 111.
26. PARTY IS ESTOPPED BY HIS ANSWER from showing the averments therein contained to be untrue. *Wilcoxon v. Burton*, 66.
27. NEW TRIAL WILL NOT BE GRANTED because the court examined account-books as evidence after the case was submitted, if such irregularity is not stated in the record as one of the grounds upon which the motion for a new trial would be made. *Id.*
28. DENIAL THAT ASSIGNMENT WAS IN WRITING, OR FOR VALUABLE CONSIDERATION, does not amount to a denial of the fact of an assignment alleged in the complaint, but if it denies anything, merely amounts to a denial that the assignment was written or for a valuable consideration. *Randolph v. Harris*, 139.

29. APPELLATE COURT WILL NOT GO OUTSIDE OF RECORD and hear oral proof of proceedings of a lower court. *Lewis v. Prenatt*, 321.
 30. CLAIM TO ENFORCE EXPRESS OR IMPLIED TRUST MAY BE JOINED in a complaint with a claim to enforce a vendor's lien existing without any written contract. *Burt v. Wilson*, 142.
 31. CONTINUANCE OF CASE IS NOT WITHIN DISCRETION OF COURT, except upon the showing by the parties to the action required by law. *Id.*
 32. DISCLAIMER CONTAINED IN ANSWER, to be effective, must be absolute and unqualified. Less than this, plaintiff is not bound to accept. *De Uprey v. De Uprey*, 81.
 33. REASONING AND OPINION OF COURT, upon a subject on the evidence before it, does not have the force and effect of the thing adjudged, unless the subject-matter be definitely disposed of by the decree of the court. *Davis v. Millaudon*, 517.
 34. JUDGMENT WILL NOT BE REVERSED FOR ERROR that could not affect the rights of the parties. *Tyler v. Green*, 130.
- See ATTACHMENT; CRIMINAL LAW; CORPORATIONS, 1, 2; DAMAGES, 3, 4; FRAUD, 2; PARTITION.

POSSESSION.

See ADVERSE POSSESSION.

PRESCRIPTION.

See ADVERSE POSSESSION.

PROBATE COURTS.

See EXECUTORS AND ADMINISTRATORS.

PUBLIC LANDS.

1. LEGISLATIVE GRANT PASSES TITLE TO GOVERNMENT LANDS as effectually as a patent. *Meyerle v. Ashe*, 76.
2. UNITED STATES PATENT IS NO HIGHER EVIDENCE OF TITLE than a prior legislative grant. *Id.*
3. GRANT OF FIVE HUNDRED THOUSAND ACRES of land under act of Congress of September 3, 1841, to each new state upon its admission into the Union, imports a present grant, and the title to the lands granted passes upon the admission of the state, although it does not attach to any particular parcel until selected and located by the officers or agents of the state, and approved by the United States. *Id.*
4. WHEN PARTICULAR PARCEL OF LAND is selected by the state, through her officers or agents, as a part of the five hundred thousand acres granted by the United States to each new state upon her admission into the Union, and such selection and location are approved by the United States, the title becomes perfect, and attaches to the tract selected. Such title then vests in the state or her grantee, and prevails over that asserted by the holder of a subsequent United States patent. *Id.*
5. PARTY CLAIMING TITLE TO PARTICULAR PARCEL OF LAND through the state, under the act of Congress granting to each state five hundred thousand acres of land upon her admission into the Union, is obliged to show, as against one claiming title under a subsequent United States patent, the performance of all acts required by law to constitute the selection and location of the land. *Id.*

6. **IN EJECTMENT, WHERE PLAINTIFF OFFERS IN EVIDENCE a United States patent and rests, defendant is entitled to offer in evidence a prior patent from the state, and in connection therewith to prove that the recitals in the patent are true, showing that the land has been properly selected and located by the state from a part of the grant to the state by act of Congress of September 3, 1841. *Id.***
7. **IN POSSESSORY ACTION FOR PUBLIC LANDS, where the plaintiff claims to recover by reason of prior possession, and the defendant claims as a pre-emptor under the laws of the United States, the latter is entitled to prove the necessary facts to establish his pre-emption right. *Tyler v. Green*, 130.**
8. **PATENTEE OF FRACTIONAL TRACT OF GOVERNMENT LAND, BOUNDED UPON NAVIGABLE STREAM, TAKES TO WATER'S EDGE. The meander line is not a line of boundary. *Kraut v. Cranford*, 414.**
9. **ACCRETION BETWEEN MEANDER LINE AND WATER'S EDGE ON NAVIGABLE STREAM BELONGS to the owner of the adjoining land. *Id.***

RAILROADS.

1. **LIABILITY OF RAILROAD COMPANY FOR INJURY TO PASSENGER AT PLACE WHICH IT IS NOT BOUND TO KEEP IN REPAIR. — Where a railroad train is stopped on a dark night, merely waiting for a train from the opposite direction to pass, at a place several rods from a passenger station, and no notice is given by the servants of the company to passengers that they may leave the cars, one who leaves the cars and receives a personal injury by walking into an open cattle-guard cannot recover damages of the company therefor; and it makes no difference that he was misinformed by some individual not in the company's employment that he must go and see to having his baggage passed at the custom-house, supposed to have been reached by the train, or that the train was near a passenger station which was not the place of his destination. *Frost v. Grand Trunk R. R. Co.*, 668.**
2. **RAILROAD COMPANIES ARE LIABLE TO STRANGERS for failure of their agents and employees to exercise ordinary care and skill in operating their trains. *Louisville etc. R. R. Co. v. Collins*, 486.**
3. **RAILROAD COMPANY IS TO BE REGARDED AS CONSTRUCTIVELY PRESENT through its acting agents, who represent it, within the range of their ordinary employment. *Id.***
4. **RESPONSIBILITY OF RAILROAD COMPANIES FOR INJURIES RESULTING FROM NEGLIGENCE OF ENGINEERS is graduated by the class of persons injured. As to strangers, ordinary negligence is sufficient; as to subordinate employees associated with the engineer in conducting the cars, the negligence must be gross; but as to employees in a different department of service, unconnected with the running operations, ordinary negligence may be sufficient. *Id.***
5. **RAILROAD COMPANIES ARE COMMON CARRIERS, AND ARE LIABLE AS SUCH by the rules of the common law for losses occurring from any accident which may befall the goods during the transit, except such as result from the act of God or the public enemy. *Bansemer v. Toledo etc. R'y Co.*, 367.**
6. **WAREHOUSE OR DEPOT AT TOWN OR STATION TO WHICH GOODS ARE SHIPPED BY RAILROAD is the proper place of delivery to the consignee, and when they are so discharged from the cars, and in the absence of the consignee are safely stored in the company's warehouse, the liability of**

- the railroad company as a common carrier is terminated, without notice to the consignee of the arrival of the goods. *Id.*
7. RAILROAD COMPANY IS LIABLE AS WAREHOUSEMAN FOR GOODS STORED at the place to which they were consigned and have been brought, and as such it is required to keep the goods in store for the consignee for a reasonable time, without additional reward. *Id.*
 8. IN INDIANA, RAILROAD COMPANIES ARE REQUIRED BY STATUTE TO FENCE THEIR ROADS, and the law so providing is construed as a police regulation for the safety of the public; and therefore the fact that a railroad runs alongside of a public highway would seem to require peculiar care on the part of the company in complying with the law. *Indiana etc. R. R. Co. v. Guard*, 327.
 9. RAILROAD COMPANY IS NOT AUTHORIZED BY COMMON LAW TO ALIENATE OR MORTGAGE ITS FRANCHISE. — A railroad company, created for the express and sole purpose of constructing, owning, and managing a railroad; authorized to take land for this public purpose under the right of eminent domain; whose powers are to be exercised by officers expressly designated by statute; having public duties the discharge of which is the leading object of its creation; and which is required to make returns to the legislature, — is not authorized by common law to alienate or mortgage its franchise without authority other than that derived from the fact of its own incorporation. *Commonwealth v. Smith*, 672.
 10. CORPORATIONS HAVE POWER BY COMMON LAW TO ISSUE BONDS, but under the statute of Massachusetts, railroad corporations have no power to issue bonds for the payment of money, except for the purposes and in the mode therein authorized. All bonds issued otherwise are void. *Id.*
 11. MORTGAGE IS VOID WHICH IS MADE TO SECURE RAILROAD BONDS issued for purposes not authorized by the statute, and not in the mode therein prescribed. *Id.*
 12. RAILROAD BONDS ISSUED AND MORTGAGE GIVEN OF ITS FRANCHISE AND OTHER PROPERTY IN VIOLATION OF STATUTE MAY BE ATTACKED as invalid, even in a collateral proceeding, by one who has taken a valid second mortgage on the property, and not made expressly subject to the former mortgage. *Id.*
 13. RIGHTS OF SECOND MORTGAGEE OF RAILROAD AND ITS FRANCHISE WHEN FIRST MORTGAGE IS VOID. — One holding a valid second mortgage upon a railroad and its franchise, and not made expressly subject to a former first mortgage, has a plain, adequate, and complete remedy at law, and cannot, therefore, maintain a bill in equity to procure the cancellation of such first mortgage, which is void, and thus remove a cloud upon his title. *Id.*
 14. STREET-RAILWAY CORPORATION HAS NO POWER TO MORTGAGE ITS FRANCHISE, ROAD, OR PROPERTY, without legislative authority, and a mortgage without such authority is wholly void. *Richardson v. Sibley*, 700.
- See COMMON CARRIERS, 5-8, 21-26; CORPORATIONS, 26, 27; DAMAGES, 5; EMINENT DOMAIN, 4; MASTER AND SERVANT, 2, 7, 9, 13, 14; NEGLIGENCE; TAXATION, 5.

RAPE.

See CRIMINAL LAW, 13, 14.

RECEIVERS.

1. WHERE RECEIVER IS APPOINTED IN EQUITY, and sells the property of defendant, who, before final decree, and while the fund is still in the re-

ceiver's hands, becomes an insolvent petitioner, and has the receiver appointed his permanent trustee, the court of equity in which the fund is found at the moment of insolvency is not debarred from taking all steps necessary to its preservation. *Henry v. Kaufman*, 591.

2. RECEIVER CANNOT, BY BECOMING TRUSTEE of an insolvent, defy the authority of the court from which he received his appointment, and refuse to account for the funds committed to him as receiver. *Id.*
3. ORDER OF COURT REQUIRING RECEIVER to bring the fund in his hands into the court from which he received his appointment as receiver does not conflict with the power of the insolvent court in appointing him the permanent trustee of the party whose property he had sold as receiver, but is ancillary to it. The fund being brought in and the amount ascertained, an order to pay over to the insolvent trustee would follow as matter of course. *Id.*
4. WHEN FUND IN HANDS OF RECEIVER is in the custody of the court of equity which appointed him, his office as receiver is not *functus officio* until his liability as to the fund is determined, and his subsequent appointment by an insolvent court as permanent trustee for the party whose property he had sold as receiver does not release him from responsibility to the court of equity for the faithful discharge of his trust as receiver. *Id.*
5. ORDINARILY, NO APPEAL WILL LIE from an order requiring a trustee or receiver to bring money into court; such orders rest in its discretion and where they determine no right, are not the subject of review on appeal. *Id.*

REFEREES.

INTERLOCUTORY DECREE, RENDERED BY CONSENT, REFERRING CASE TO MASTER "for hearing and determination on the merits," and requiring him "to render a decree on the merits, and report the same," though much broader in its terms than common, will still be regarded merely as a reference for the opinion of the master, and his report will be subject to the supervision of the court. *Rankin v. Rankin*, 205.

See ARBITRATION AND AWARD.

REGISTRATION OF VOTERS.

See ELECTIONS; INJUNCTIONS.

RELEASE.

RELEASE NEED NOT BE AVERRED TO BE UNDER SEAL. A release imports a seal, and it is a matter of evidence whether it have a seal or not, if a seal be necessary. *Illinois Central R. R. Co. v. Read*, 260.

REPLEVIN.

1. ACTION CANNOT BE MAINTAINED BY OWNER OF GOODS AGAINST SHERIFF, or his deputy personally, for taking such goods under a writ of replevin against another person having them in possession. *Willard v. Kimball*, 632.
2. FAILURE OF PLAINTIFF IN REPLEVIN TO MAINTAIN HIS ACTION will not render the officer who served the writ liable in damages to the defendant, or to any other person who may have a claim to the replevied property. *Id.*

3. REPLEVIN — QUESTION OF PROPERTY, HOW TRIED. — By the English law, if the defendant in replevin claim property in the goods or chattels described in the writ, the officer cannot lawfully deliver them to the plaintiff until the question of property has been determined in his favor on a writ of *de proprietate probanda*, sued out by him. In Massachusetts, the question of property is to be tried in the replevin suit. *Id.*
4. TRESPASS IS MAINTAINABLE, UNDER ENGLISH LAW, AGAINST OFFICER SERVING WRIT OF REPLEVIN and delivering goods and chattels to the plaintiff, where the defendant in replevin claims property in them, and the plaintiff has not sued out his writ of *de proprietate probanda*. *Id.*
5. JUDGMENT IN ACTION AGAINST SURETIES ON REPLEVIN BOND cannot be given for more than the penalty and costs. Interest is not recoverable. *Fraser v. Little*, 741.

RIPARIAN RIGHTS.

1. RIPARIAN PROPRIETOR TO WHOM WATER FIRST COMES HAS NO RIGHT TO ERECT DAMS across the stream and spread out the water, so that it is lost by absorption and evaporation to an extent that prevents it from flowing to another riparian proprietor, as it would have done but for the dams. *Ferre v. Knipe*, 128.
2. IT IS NOT REASONABLE USE OF WATER FOR RIPARIAN PROPRIETOR, who desires to use the same for watering cattle and for domestic purposes, to erect dams across the stream, by which the water is spread out and lost by evaporation and absorption so as to injure another riparian proprietor below. *Id.*

SALES.

1. FACT THAT HORSE IS BRANDED WITH LETTERS "U. S." is not *per se* proof of title in the United States. *Plummer v. Newdigate*, 479.
 2. ACTION WILL LIE FOR BREACH OF IMPLIED WARRANTY OF TITLE TO HORSE IN VENDOR'S POSSESSION without a judicial eviction, as required in express warranties; but to entitle the plaintiff to recover, the proof of breach should be peculiarly satisfactory. *Id.*
 3. EX PARTE ACT OF MILITARY OFFICER IN SEIZING HORSE CLAIMED TO BELONG TO UNITED STATES can have no effect on the question of ownership without strong proof that his act was right. *Id.*
 4. SALE OF PROPERTY NOT SUSCEPTIBLE OF DELIVERY, AS GROWING CROP, IS NOT CONSTRUCTIVELY FRAUDULENT as to creditors or subsequent purchasers merely because the seller retained possession, and was to cultivate and deliver it at a stated time. *Cummins v. Griggs*, 482.
- See AGENCY, 1; EXECUTIONS; EXECUTORS AND ADMINISTRATORS; GUARDIAN AND WARD; MISTAKE; STATUTE OF FRAUDS; USAGE.

SEDUCTION.

1. UNMARRIED FEMALE MAY REFORM AND GAIN CHARACTER FOR CHASTITY, within the meaning of section 4209 of the Iowa Revision of 1880, making the seduction of a female of "previously chaste character" a crime, where she has become unchaste by sexual intercourse. *State v. Carros*, 401.
2. QUESTION OF PREVIOUSLY CHASTE CHARACTER OF PROSECUTRIX IS ONE OF FACT FOR JURY, in a criminal prosecution for seduction. *Id.*

SET-OFF.

BURDEN OF PROOF IS ON DEFENDANT PLEADING SET-OFF to show that his claim filed in set-off is due from the plaintiff in the same right with the cause of action declared on in the writ; and if the plaintiff describes himself in the writ as administrator of the estate of a deceased person, and declares upon a promissory note signed by only one person, and running to him as administrator of that estate, this will not be sufficient to afford a presumption that his claim is in his representative capacity. *Lovell v. Nelson*, 706.

See EXEMPTIONS.

SHERIFFS.

IN ACTION AGAINST SHERIFF FOR VIOLATION OF DUTY IN SERVICE OF ATTACHMENT, if he relies on matters occurring after its issuance and operating to dissolve it, such matters must be specially pleaded. *McComb v. Reed*, 115.

See ATTACHMENT, 2, 3; REPLEVIN, 1, 2, 4.

SLANDER.

1. WORDS "I HAVE F—KED REBECCA KELLEY ONE HUNDRED TIMES" are actionable *per se*, the word "f—ked" having a recognized meaning, but the words "I have screwed Beck Kelley one hundred times" are not actionable, unless the word "screwed" is aided by other averments. *Linck v. Kelley*, 362.
2. **IN ACTION FOR SLANDER, IF COMPLAINT FAILED TO SHOW** that the sexual intercourse implied by the words charged as slanderous was illicit, the defect would be cured by answer admitting the speaking of the words, and alleging that he had so had illicit intercourse with the plaintiff, and that she had consented thereto. *Id.*

SLANDER OF TITLE.

SLANDER OF TITLE—MALICE—ADVICE OF COUNSEL.—Where plaintiff brings an action against defendant for slander of his title to certain land, and the evidence showed that plaintiff offered the land for sale at auction; that defendant was present and forbade the sale, declaring that plaintiff had only a dower interest in the land, and that the title was in himself; that in so declaring defendant was acting under advice of counsel, but that such advice was procured by false representations made to his counsel by defendant,—it is proper for the court to submit the question of the latter's malice or *bona fides* to the jury. *Gent v. Lynch*, 558.

SPECIFIC PERFORMANCE.

1. **COURT WILL NOT GENERALLY COMPEL SPECIFIC PERFORMANCE**, unless it can at the time execute the whole contract on both sides, or at least such part of it as the court can ever be called upon to enforce; but this rule is subject to some exceptions, and among the exceptions are the cases of contracts where the consideration is entire, but the performance separate. *Sterling v. Klepsattle*, 319.
2. **SPECIFIC PERFORMANCE OF CONTRACT WHEREBY ONE PARTY SELLS TRACT OF LAND** to another, and puts him in possession, agreeing to execute to him, on payment of the purchase-money, a title bond, conditioned for the execution of a deed, as soon as he, the vendor, obtains his deed, will

be decreed in the vendee's suit to compel the execution of the title bond, where he alleges therein the payment of the purchase-money. *Id.*

3. **LACHES IS GROUND FOR DENIAL OF SPECIFIC PERFORMANCE** where twenty-three years have elapsed from the date of a contract for the purchase of real estate, during thirteen years of which no payments were made by the purchaser. But there is no laches where, in such a case, the vendor has preserved the vigor of the contract for his own benefit by the pendency of an action to enforce a lien for the purchase-money, and the vendee, answering to that action, offers to perform, and asks specific performance against the vendor; for the latter, by his own act, has thereby continuously recognized the obligation of the contract. *Bennett v. Welch*, 354.

STATUTES.

1. **LEGISLATURE CANNOT DIVEST INDIVIDUAL OF VESTED RIGHT**, although it may require the performance of an act in the future, and declare that its omission shall subject an individual to a penalty. *Conway v. Cable*, 240.
2. **STATUTES SHOULD BE CONSTRUED, IF POSSIBLE, TO HAVE PROSPECTIVE RATHER THAN RETROSPECTIVE OPERATION**, where they would impair the validity of contracts or divest the rights of property. *Id.*
3. **LEGISLATURE, IN RE-ENACTING LAW WITHOUT CHANGE OR AMENDMENT**, is deemed thereby to adopt the construction placed upon it by the courts. *Indiana etc. R. R. Co. v. Guard*, 327.
4. **LAWS TO CARRY ON GOVERNMENT ARE TO RECEIVE LIBERAL CONSTRUCTION TO EFFECTUATE OBJECTS DESIGNED**, and if the legislative purpose can be arrived at in the absence of express language, that meaning is to be observed and obeyed. *Hardesty v. Taft*, 584.

See CONSTITUTIONAL LAW.

STATUTE OF FRAUDS.

1. **MEMORANDUM REQUIRED BY STATUTE OF FRAUDS TO MAINTAIN ACTION ON CONTRACT FOR SALE OF ANY INTEREST IN LAND MUST CLEARLY SHOW**, either by itself or taken in connection with some other writing contemporaneous with or referred to in the memorandum, what that interest is. *Farwell v. Mather*, 641.
2. **MEMORANDUM REQUIRED BY STATUTE OF FRAUDS MAY BE INTERPRETED BY RESORT TO ORAL EVIDENCE**. The court may ascertain by such evidence the relations of the parties to any property which will satisfy the terms of the memorandum, but the writing, whether consisting of one paper or several, must describe or identify the subject of the contract. *Id.*
3. **MEMORANDUM IN WRITING AGREEING TO GIVE CERTAIN SUM** "for the whole property, from cellar to top, including lease, press, boiler and engine, type, fixtures, furniture," etc., and to pay a certain sum quarterly until the principal and interest are paid, and "in addition pay over the \$1,215 to be received from P., and the proceeds and good-will of the Times, all of which sums shall be deducted from" the gross sum to be paid, is not sufficient to take the contract out of the statute of frauds. *Id.*
4. **SAME**. — No ACTION UPON SUCH CONTRACT CAN BE SUPPORTED BY ADDITION OF ORAL PROOF THAT MEMORANDUM WAS INTENDED TO APPLY to an unexpired lease of a certain building, subject to a certain ground-rent, in which building the press and other articles were situated and the Times newspaper was printed; that P. had agreed and bargained with the vendor, in consideration of \$1,215, for a release and conveyance of a

small portion of the land included in said lease; and that there was no other building anywhere owned or held by the vendor under a lease to which the description would apply. *Id.*

6. DEFENDANT MAY WAIVE PROTECTION OF STATUTE OF FRAUDS, where it is sought to charge him as trustee on a contract within the statute, by admitting the contract in his answer and failing to claim the benefit of the statute. *Burt v. Wilson*, 142.

STATUTE OF LIMITATIONS.

1. STATUTE OF LIMITATIONS IS APPLICABLE TO CAUSES OF ACTION IN EQUITY as well as to those at law. *Boyd v. Blankman*, 146.
2. PERSONS DEAF AND DUMB FROM BIRTH ARE, *prima facie*, *non compos mentis*, and the statute of limitations does not run against them unless they are shown to possess sufficient intelligence to know and comprehend their legal rights and liabilities, and thereby rebut the legal presumption of incapacity. *Oliver v. Berry*, 537.
3. DEFENDANT RELYING ON STATUTE OF LIMITATIONS MUST ALLEGE, NOT MATTER OF LAW, but the facts which bring the case within the operation of the statute. *Boyd v. Blankman*, 146.
4. IF PLAINTIFF FAILS TO STATE TRULY TIME WHEN HIS CAUSE OF ACTION ACCRUED, the defendant may aver the truth in that respect, and if it is established on the trial, he will secure the same result that he would have secured by demurrer had the plaintiff's complaint truly stated the time when the cause of action accrued. *Id.*
5. CASES OF CONSTRUCTIVE FRAUD ARE WITHIN SAVING CLAUSE of section 17 of the statute of limitations, which provides that an action for relief on the ground of fraud shall not be deemed to have accrued until the discovery of the facts constituting the fraud. *Id.*
6. ACTION FOR RELIEF ON GROUND OF FRAUD MAY BE COMMENCED AT ANY TIME within three years after a discovery of the facts constituting the fraud, or of facts sufficient to put a person of ordinary intelligence and prudence on inquiry. *Id.*

See ADVERSE POSSESSION; FRAUD, 2.

SUNDAYS.

See CONTRACTS, 11; DEEDS, 1-3.

SUPPLEMENTARY PROCEEDINGS.

See EXECUTIONS, 12, 13.

SURETYSHIP.

See CORPORATIONS, 3; NEGOTIABLE INSTRUMENTS, 13, 14.

TAXATION.

1. LEGISLATURE CANNOT VALIDATE INVALID TAX SALE by a subsequent law. *Conroy v. Cable*, 240.
2. OWNER OF LAND INCURS NO FORFEITURE BY PERMITTING HIS LAND TO BE SOLD FOR TAXES in a manner not according to law. The purchaser at a tax sale is bound to see that all of the essential requirements of the law have been performed before he can acquire title. *Id.*
3. WHERE PERSONAL PROPERTY IS TAKEN BY COLLECTOR IN SATISFACTION OF ILLEGAL TAX and sold, and the avails paid to the town, the owner may

recover back the money in an action of *assumpsit* against the town. *Bailey v. Town of Goshen*, 191.

4. PURCHASER AT TAX-SALE TO WHOM OWNER TENDERS AMOUNT OF HIS BID, with twenty-five per cent interest, for an assignment of the certificate of sale, and who orally agrees to make such assignment to the owner within a few days and receive the money, but in fact obtains a deed from the auditor-general after the owner, relying upon this promise, has allowed the time for redemption to expire, and refuses, upon tender of the amount of his bid, with interest and charges, to convey to the owner, is guilty of a fraud upon the owner, cannot avail himself of the statute of frauds as a defense, and will be compelled by equity to convey to the owner. *Laing v. McKee*, 738.
5. ROLLING STOCK OF RAILROAD IS SO CONNECTED WITH PURPOSES AND USES OF TRACK AND SUPERSTRUCTURE that it is within the power of the legislature to treat it as real property, for the purposes of taxation. *Louisville etc. R. R. Co. v. State*, 358.
6. INDIANA CONSTITUTION DOES NOT REQUIRE UNIFORM METHOD OF VALUATION OF PROPERTY FOR TAXATION, but only "such regulations as shall secure a just valuation"; and in determining how this end shall be secured, the legislature must exercise a discretion, and unless the method adopted be clearly inadequate to secure the result, the courts cannot interfere. *Id.*
7. STATUTE PROVIDING THAT APPRAISERS, IN ESTIMATING VALUE OF ROAD FOR PURPOSE OF TAXATION, shall take into consideration the location of the road for business, the competition of other roads, its earnings, etc., is constitutional. *Id.*
8. TIME FOR MAKING RETURN OF TAXABLE PROPERTY IN INDIANA stated. *Id.*

See USURY.

TENDER.

1. TENDER IN OPEN COURT OF THING DEMANDED, or its equivalent, is an admission that the thing itself is due, and is inconsistent with an averment that the thing is not due. *Davis v. Millaudon*, 517.
2. PLEA OF PAYMENT OR PLEA OF TENDER is inconsistent with a general denial. *Id.*
3. TENDER OF THING CLAIMED IN SUIT, when made in the course of judicial proceedings and in an unqualified and unrestricted manner, carries with it the presumption which the law attaches to a judicial confession; but when such tender is made, not of the thing claimed, but of something else, with a special reservation of all legal rights, and with the special defense that the thing claimed is not due, and when such tender is not accepted as made, it does not have that conclusive effect. *Id.*

TORTS.

DRIVING HORSE TO DEATH, JOINT LIABILITY FOR. — Where a horse is let to A, and delivered by the owner to B, upon the credit of A, and the horse is driven to death by B, with the aid and assent of A, who is driving another horse near him on the same road, both may be held jointly liable to the owner. *Banfield v. Whipple*, 618.

See MASTER AND SERVANT.

TRADE-MARKS.

1. **EXCLUSIVE RIGHT TO TRADE-MARK IS RECOGNIZED BY LAW** as a species of property. *Bradley v. Norton*, 200.
2. **IMITATION OF TRADE-MARK, TO CONSTITUTE INFRINGEMENT, NEED NOT BE PRECISE COPY**; but if there is a substantial similarity, so that the community would be likely to be deceived, it is sufficient. *Id.*
3. **INJUNCTION IS SOLE ADEQUATE REMEDY AGAINST INFRINGEMENT OF TRADE-MARK**, where it appears that the party infringing intends to continue the wrong. *Id.*
4. **INJUNCTION AGAINST INFRINGEMENT OF TRADE-MARK MAY BE GRANTED** though the party defendant is in fact only the agent of the manufacturer of the spurious article, where the latter has conducted the business through such agent and held him out to the public as the proprietor. *Id.*
5. **ONE WHO HAS SOLE INTEREST IN TRADE-MARK MAY MAINTAIN SUIT FOR INJUNCTION** against the infringement thereof without joining as a party one who is a silent partner with him in the business of manufacturing the article. *Id.*
6. **ASSIGNMENT FOR BENEFIT OF CREDITORS IS INOPERATIVE AS TO RIGHT TO TRADE-MARK** which was not inventoried by the trustee or appraisers, and never claimed by the trustee or the creditors, nor in any manner disposed of under the assignment. *Id.*
7. **ACTS OF RESPONDENT ARE SUFFICIENT EVIDENCE OF HIS INTENTION** to continue the infringement of a trade-mark, without averring and proving threats. *Id.*
8. **RIGHT OF PROPERTY IN TRADE-MARK IS RECOGNIZED BY COMMON LAW**, and does not in any manner depend for its inceptive existence or support upon statutory law, although its exercise may be limited or controlled by statute. *Derringer v. Plate*, 170.
9. **RIGHT OF PROPERTY IN TRADE-MARK IS NOT LIMITED IN ITS ENJOYMENT** by territorial bounds, but may be asserted and maintained wherever the common law affords remedies for wrongs, subject only to such statutory regulations as may be properly made concerning the use and enjoyment of other property. *Id.*
10. **CALIFORNIA ACT OF 1863 CONCERNING TRADE-MARKS DOES NOT TAKE AWAY COMMON-LAW REMEDY** for the protection thereof from those who do not register their trade-mark according to the provisions of the act. *Id.*

TRESPASS.

1. **POSSESSION NECESSARY TO MAINTAIN TRESPASS.** — The gist of the action of trespass is the injury done to the plaintiff's possession, and therefore, in order to maintain it, possession is necessary. This possession may be either actual or constructive; the mere right of entry on the lands is not sufficient, if they be in the actual possession and occupancy of a dis-seisor. *Gent v. Lynch*, 558.
2. **POSSESSION OF WILD UNINCLOSED LAND TO MAINTAIN TRESPASS.** — Where defendant has entered upon an outlying unclosed lot of plaintiff's, and has cut and sold wood off it from time to time, these were mere successive acts of trespass, and the title being in plaintiff, the constructive possession is in her, and she may maintain trespass against defendant. *Id.*

See CO-TENANCY.

TROVER.

See MARRIED WOMEN, 2.

TRUSTS.

1. NO EXPRESS OR IMPLIED TRUST IS CREATED BY TRANSACTION, whereby one of two partners, who are embarrassed with debts, executes a deed to the other, absolute on its face, with a consideration expressed, of both his individual property and interest in the partnership property, for the purpose of enabling the grantee to raise money by mortgaging the same to pay the firm debts. *Burt v. Wilson*, 142.
2. GRANTEE HOLDS LAND IN TRUST FOR GRANTOR to the extent of the purchase-money, where he has received an absolute conveyance and has failed to make any payment of the purchase price, and such trust descends to the representatives and heirs of the grantee, against whom a lien for the purchase-money will be enforced. *Id.*

See AGENCY, 2; ATTACHMENT, 6-12; HOMESTEADS, 11.

USAGE.

BROKER HAS NO IMPLIED AUTHORITY, FROM USAGE OF TRADE, TO WARRANT GOODS SOLD by him to be of merchantable quality; and evidence to prove such usage is inadmissible, and a memorandum made by such broker of a contract for the sale of goods is invalid and inadmissible in evidence, if he has inserted therein, without express authority, a warrant by the seller that such goods are of merchantable quality. *Dodd v. Farlow*, 726.

USURY.

USURY. — PAYMENT OF CHARGES FOR TAXES on a mortgage by the mortgagor under an agreement to that effect, with simple interest on each item from the time it was paid, is not usurious. *Banks v. McClellan*, 594.

See INTEREST; MORTGAGES, 1; NEGOTIABLE INSTRUMENTS, 3.

VENDOR AND VENDEE.

1. PURCHASER OF LAND FOR VALUABLE CONSIDERATION WITH NOTICE OF PRIOR DEED for same land made by the grantor during infancy, but without notice of a subsequent ratification of that deed, will hold the land against the prior grantee. *Black v. Hills*, 224.
2. ONE HAS AS PERFECT LEGAL RIGHT TO PURCHASE LAND which his grantor has conveyed during minority as to purchase land that has never been conveyed at all; and he is not to be denied the position of an innocent purchaser because he has notice of the deed made during minority. *Id.*

VOTERS.

See ELECTIONS; INJUNCTIONS.

WATERS.

1. NO RIGHT TO REGULATE OR CONTROL SURFACE DRAINAGE OF WATER CAN BE ASSERTED by owner of one lot over that of his neighbor, where there is no watercourse by grant or prescription, and no stipulation exists between such conterminous proprietors of land concerning the mode in which their respective parcels shall be occupied and improved. *Gannon v. Hargadon*, 625.

2. **SURFACE WATER UPON LAND, OWNER MAY CONTROL.** — The owner of land may lawfully occupy and improve it in such manner as to prevent surface water which accumulates elsewhere from coming upon it, or he may alter the course of surface water which has accumulated thereon or come upon it from elsewhere, although the water is thereby made to flow upon the adjoining land of another, and to stand there in unusual quantities, or to pass into and over the same in greater quantities or in other directions than it was accustomed to flow, thereby occasioning loss to the conterminous owner. *Id.*
3. **INJURIES CAUSED BY OWNER'S LAWFUL CONTROL OF SURFACE WATER ARE DAMNUM ABSQUE INJURIA.** The right of a party to the free and unfettered control of his own land above, upon, and beneath the surface cannot be interfered with or restrained by any considerations of injury to others which may be occasioned by the flow of mere surface water in consequence of the lawful appropriation of land by its owner to a particular use or mode of enjoyment. If such an act causes damages to adjacent land, it is *damnum absque injuria*. *Id.*

See RIPARIAN RIGHTS.

WAYS.

1. **IF PRIVATE WAY BE UNLAWFULLY OBSTRUCTED BY OWNER OF ADJOINING LAND,** a person entitled to use the way may pass over the adjoining close, so far as may be necessary to avoid the obstructions, taking care to do no unnecessary damage. *Kent v. Judkins*, 544.

WEIGHTS AND MEASURES.

1. **CONGRESS HAS POWER UNDER NATIONAL CONSTITUTION TO FIX STANDARD OF WEIGHTS AND MEASURES;** but this power it has never exercised, and until it does so, the respective states may, for themselves, regulate weights and measures. *Harris v. Rutledge*, 441.
2. **STATUTE REGULATING WEIGHTS AND MEASURES BINDS PARTIES TO CONTRACTS,** and local customs fixing different weights or measures cannot be set up unless mentioned in the contract. *Id.*
3. **CONTRACT FOR MASONRY AT SPECIFIED PRICE PER PERCH WILL BE CONSTRUED** according to the statute defining the number of cubic feet in a perch, in the absence of any expression to the contrary; no implied contract to the contrary is competent, and if both parties contemplated a perch of a different number of feet, then the contract must be corrected in a court of equity. *Id.*

WILLS.

1. **IT IS INSUFFICIENT ATTESTATION OF WILL** for subscribing witness to write his name in the absence of the testator, and in anticipation of the testator's signature, although he afterwards acknowledges it in the presence of the testator and of the other subscribing witnesses. *Chase v. Kittredge*, 687.

See EXECUTORS AND ADMINISTRATORS.

WITNESSES.

1. **CLERK IS COMPETENT WITNESS TO PROVE NON-DELIVERY OF PACKAGE,** as having no interest in the event of the suit, where the suit is brought by his employer against an express company for the loss of a package of money, the clerk having receipted for the package without receiving it,

supposing that he was receipting for other articles, and the clerk's father afterwards voluntarily paid to the employer the amount of the loss. *American Express Co. v. Haggard*, 257.

2. WITNESS IS NOT QUALIFIED TO TESTIFY AS EXPERT AS TO EXPECTATION OF LIFE at a certain age, where he has had but an experience of six months as a life insurance agent. *Id.*

See EVIDENCE.

WRITS.

1. OFFICER WHO SERVES WRIT OF POSSESSION HAS NO AUTHORITY BY HIS PRECEPT TO REMOVE OR EXPEL from the premises third persons who have been in possession since the suit was commenced in which the writ issued, claiming title in themselves, who were not defendants in such suit, who do not claim under the person against whom that writ runs, and who do not resist the officer in his attempt to remove the latter and those claiming under him. *Clark v. Parkinson*, 628.
2. BOND OF INDEMNITY IS USUALLY TAKEN IN ENGLAND BY OFFICER WHO SERVES WRIT OF POSSESSION. *Id.*

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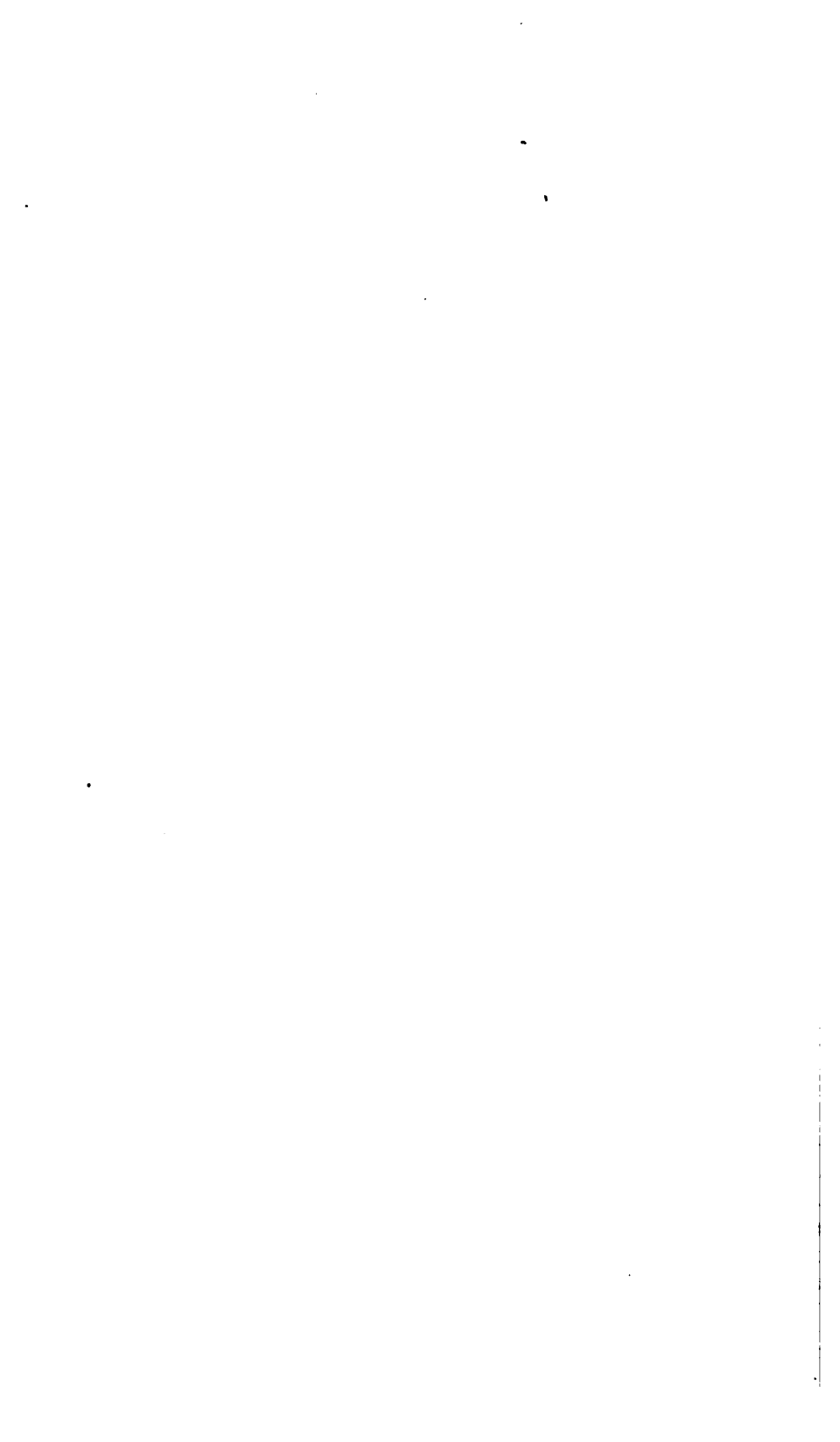
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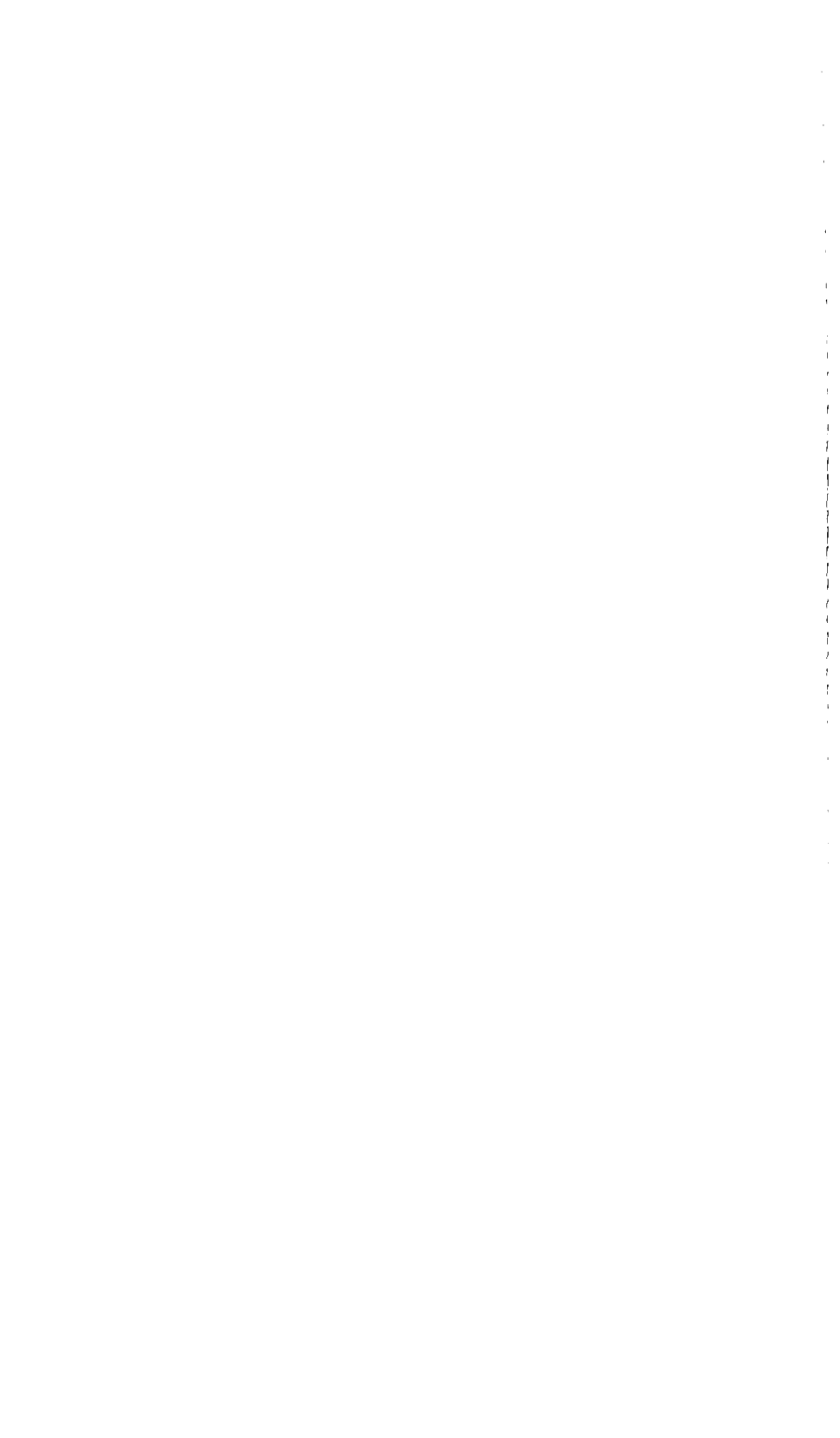


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